Supreme Court, U.S.
FILED

981146 JAN 19 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

DANIEL SCHLEIFER, a minor by Barry Schleifer, WILLIAM MCCUTCHEON, a minor by M. Parthenia Monaga, his mother; LISA BRIGGS, a minor by Anne Briggs, her mother; NORA LALLY-GRAVES, a minor by Mary Ann Lally-Graves, her mother; JILL LANDERS JAQUITH, a minor by Harry James Landers, her father; ANNE BRIGGS; HARRY JAMES LANDERS; and WALDO DAVID LANDERS JAQUITH,

Petitioners,

v.

CITY OF CHARLOTTESVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DEBORAH C. WYATT*
Wyatt & Carter
300 Court Square
Charlottesville, VA 22902
(804) 296-4130

MARY C. BAUER
American Civil Liberties Union Foundation, VA
6 North 6th Street
Richmond, VA 23219
(804) 644-8080

Attorneys for Petitioners
*Counsel of Record

147PP

QUESTIONS PRESENTED

I.

Is an ordinance which forbid minors from leaving their houses for certain portions of every day, regardless of the wishes of their parents, compatible with the recognized fundamental right of those parents to make decisions on the raising and preparing of their children for society?

II.

Does an ordinance which forbids minors from leaving their houses for certain portions of every day withstand constitutional scrutiny under the Fourteenth Amendment, particularly in the absence of meaningful evidence that the law would actually serve any enumerated objective?

III.

Can an ordinance which forbids minors from leaving their houses for certain portions of every day pass constitutional muster under the First Amendment when, despite a "First Amendment" exception, no guidelines do or can exist to determine what speech or actions are exempted from those which are not?

TABLE OF CONTENTS

Page

I. OPINIONS BELOW 1

II. JURISDICTION 2

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

IV. STATEMENT OF THE CASE.....

V. REASONS FOR GRANTING THE WRIT..... 11

LOWER COURTS ARE APPLYING WIDELY VARYING ANALYSIS AND REACHING WIDELY VARYING ANSWERS TO THE QUESTIONS PRESENTED IN THIS CURFEW CASE, WHILE THE NUMBERS OF CURFEWS AND CHALLENGES THERETO ARE INCREASING NATIONWIDE..... 11

CHARLOTTESVILLE'S CURFEW BOTH DEPRIVES PARENTS OF FUNDAMENTAL RIGHTS IN CHILD-REARING AND DEPRIVES ITS YOUTHFUL CITIZENS OF RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENT..... 15

A. The curfew deprives parents of their historically fundamental right to direct the rearing of their children in the absence of a showing of need for this interference..... 15

B. The curfew discriminates against minors in matters of fundamental freedoms, and is not justified under strict scrutiny, or even lesser scrutiny.....17

C. The curfew leaves individual police and "Establishment" owners to guess as to which meetings and discussions are worthy of First Amendment protection 19

VI. CONCLUSION 22

VII. APPENDIX A1

A. Memorandum Opinion and Order of the United States District Court, April 30, 1997 ..... A1

B. Memorandum Opinion and Order of the United States District Court, May 20, 1997 ..... A38

C. Opinion and Judgment of the United States Court of Appeals for the Fourth Circuit, October 20, 1998 ..... A51

TABLE OF AUTHORITIES

Page

Cases

Aptheker v. Secretary of State, 378 U.S. 500 (1964).....17

Bellotti v. Baird, 443 U.S. 622 (1979).....15

City of Chicago v. Youkhana, 277 Ill. App. 3d 101, 213 Ill. Dec. 777, 660 N.E.2d 34, 166 Ill. 2d 537, 216 Ill. Dec. 2, 664 N.E.2d 639, 177 Ill. 2d 440, 227 Ill. Dec. 130, 687 N.E.2d 53, *cert. granted sub nom. Chicago v. Morales*, 118 S.Ct. 1510 (1998).....17,22

Clark v. Jeter, 486 U.S. 456 (1988).....18

Coates v. Cincinnati, 402 U.S. 611 (1971).....19

Gaffney v. City of Allentown, No. 97-4455 1997WL 597989 (E.D.Pa. 1997).....13,14,16

Hirabayashi v. United States, 320 U.S. 81 (1943)...11

Hutchins v. District of Columbia, 144 F.3d 798, (D.C.Cir. 1998), *vacated for rehearing en banc*, 156 F.3d 1267 (D.C.Cir. 1998).....12,13,14

Hutchins v. District of Columbia, 942 F. Supp. 665 (D.D.C. 1996).....12,13,14

Kent v. Dulles, 357 U.S. 116 (1958).....17

Korematsu v. United States, 323 U.S. 214 (1944)...11

NAACP v. Alabama, 377 U.S. 288 (1964).....21

Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997).....12,13,14

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).....17

Parham v. J.R., 442 U.S. 584 (1979).....16

Plyler v. Doe, 457 U.S. 202 (1982).....11

Prince v. Massachusetts, 321 U.S. 158 (1944)...15,16

Qutb v. Strauss, 11 F.3d 488 (5th Cir. 1993)...11,13,14

Reno v. ACLU, 117 S.Ct. 2329 (1997).....15

Tinker v. Des Moines School Dist., 393 U.S.503 (1969).....19

Turner Broadcasting System, Inc. v. FCC, 512 U.S.622 (1994).....19,20

Wisconsin v. Yoder, 406 U.S. 205 (1972).....16

Constitutional and Statutory Provisions

U.S. CONST. amend. XIV.....*passim*

U.S. CONST. amend. XIV.....*passim*

42 U.S.C. § 1983.....10

28 U.S.C. § 1301 10

28 U.S.C. § 1254 2

Ordinance

Section 17-7, Code of the City of Charlottesville (1990), *as amended* ..... *passim*

No. _____

In The

Supreme Court of the United States

October Term, 1998

DANIEL SCHLEIFER, a minor by Barry Schleifer, WILLIAM MCCUTCHEON, a minor by M. Parthenia Monaga, his mother; LISA BRIGGS, a minor by Anne Briggs, her mother; NORA LALLY-GRAVES, a minor by Mary Ann Lally-Graves, her mother; JILL LANDERS JAQUITH, a minor by Harry James Landers, her father; ANNE BRIGGS; HARRY JAMES LANDERS; and WALDO DAVID LANDERS JAQUITH,

Petitioners,

v.

CITY OF CHARLOTTESVILLE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The April 30, 1997, Opinion of the United States District Court for the Western District of Virginia, is reported at 963 F.Supp. 534, and is reprinted in the Appendix at pages A1-A36. The May 20, 1997, Opinion of the court, which incorporates the earlier opinion, is reported at 992 F.Supp. 823, and is reprinted in the Appendix at pages A38-49. The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 159 F.3d 843 (1998), and is reprinted in the Appendix at pages A 51-113.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1998. The jurisdiction of this Court to issue a writ of certiorari in this case is grounded on 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves § 17-7 of the Charlottesville City Code, 1990, *as amended*, enacted December 16, 1996, which provides in pertinent part as follows:

> Section 17-7 Curfew for Minors.
>
> The purpose of this section is to: (i) promote the general welfare and protect the general public through the reduction of juvenile violence and crime within the City; (ii) promote the safety and wellbeing of the City's youngest citizens, persons under the age of seventeen (17), whose inexperience renders them particularly vulnerable to becoming participants in unlawful activities, particularly unlawful drug activities, and to being victimized by older perpetrators of crime; and (iii) foster and strengthen parental responsibility for children.

(a) Definitions.

As used within this section 17-7, the following words and phrases shall have the meanings ascribed to them below:

"Curfew hours" refers to the hours of 12:01 a.m. through 5:00 a.m. on Monday through Friday, and 1:00 a.m. through 5:00 a.m. on Saturday and Sunday.

"Emergency" refers to unforeseen circumstances, or the status or condition resulting therefrom, requiring immediate action to safeguard life, limb or property. The term includes, but is not limited to, fires, natural disasters, automobile accidents, or other similar circumstances.

"Establishment" refers to any privately-owned place of business within the City operated for a profit, to which the public is invited, ...

"Minor" refers to any person under seventeen (17) years of age who has not been emancipated by court order entered pursuant to Section 16.1-333 of the Code of Virginia, 1950, as amended.

. . .

"Public Place" refers to any place to which the public or a substantial group of the public has access, including, but not limited to: streets, highways, roads, sidewalks, alleys, avenues, parks, and/or the common areas of schools, hospitals, apartment houses, office buildings, transportation facilities and shops.

"Remain" refers to the following actions:

(1) to linger or stay at or upon a place; and/or

(2) to fail to leave a place when requested to do so by an officer or by the owner, operator or other person in control of that place.

"Temporary care facility" refers to a non-locked, non-restrictive shelter at which minors may wait, under visual supervision, to be retrieved by a parent . . . .

(b) It shall be unlawful for a minor, during curfew hours, to remain in or upon any Public Place within the City, to remain in any motor vehicle operating or parked therein or thereon, or to remain in or upon the premises of any Establishment within the City, unless:

(1) the minor is accompanied by a parent; or

(2) the minor is involved in an emergency; or

(3) the minor is engaged in an employment activity, or is going to or returning home from such activity, without detour or stop; or

(4) the minor is on the sidewalk directly abutting a place where he or she resides with a parent; or

(5) the minor is attending an activity sponsored by a school, religious, or civic organization, by a public organization or agency, or by another similar organization or entity, which activity is supervised by adults, and/or the minor is going to or returning from such an activity without detour or stop; or

(6) the minor is on an errand at the direction of a parent, and the minor has in his or her possession a writing signed by the parent containing the following

information: the name, signature, address and telephone number of the parent authorizing the errand, the telephone number where the parent may be reached during the errand, the name of the minor, and a brief description of the errand, the minor's destination(s) and the hours the minor is authorized to be engaged in the errand; or

(7) the minor is involved in interstate travel through, or beginning or terminating in, the City of Charlottesville; or

(8) the minor is exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly.

(c) It shall be unlawful for a minor's parent to knowingly permit, allow or encourage such minor to violate 17-7(b).

...

(e) It shall be unlawful for the Operator of any Establishment, or for any person who is an employee thereof, to knowingly permit, allow or encourage a minor to remain upon the premises of the Establishment during curfew hours. . . .

. . .

(g) Enforcement.

(1) Minors. Before taking any enforcement action hereunder, an officer shall make an immediate investigation for the purpose of ascertaining whether or not the presence of a minor in a public place, motor vehicle and/or Establishment within the City during Curfew hours is in violation of 17-7(b).

(A) If such investigation reveals that the pres-

ence of such minor is in violation of 17-7(b), then:

(1) if the minor has not previously been issued a warning for any such violation, then the officer shall issue a verbal warning to the minor, which shall be followed by a written warning mailed by the police department to the minor and his or her parent(s), or

(2) if the minor has previously been issued a warning for any such violation, then the officer shall charge the minor with a violation of this ordinance and shall issue a summons requiring the minor to appear in court (*Ref. Va. Code § 16.1-260(H)(1)).* And

(B) As soon as practicable, the officer shall:

(1) release the minor to his or her parent(s); or

(2) place the minor in a temporary care facility for a period not to exceed the remainder of the curfew hours, so that his or her parent(s) may retrieve the minor; or

(3) if a minor refuses to give an officer his or her name and address, refuses to give the name and address of his or her parent(s), or if no parent can be located prior to the end of the applicable curfew hours, or if located, no parent appears to accept custody of the minor, the minor may be taken to a nonsecure crisis center or juvenile shelter and/or may be taken to a judge or intake officer of the juvenile court . . .

(2) Others. If an investigation by an officer reveals that a person has violated 17-7(c), (d) and/or (e), and if the person has not previously been issued a warning with respect to any such violation, an officer shall issue a verbal warning to the person, which shall be followed by a written warning mailed by the police department to the person; however, if any such warning has previously been issued to that person then the officer shall charge the person with a violation and shall issue a summons directing the person to appear in court.

(h) Each violation of this section 17-7 shall constitute a Class 4 Misdemeanor.

STATEMENT OF THE CASE

On December 16, 1996, the Charlottesville City Council enacted Section 17-7 (hereinafter also "the curfew"), following a suggestion by the local police chief who knew other jurisdictions were enacting curfews. The stated purposes for the ordinance were threefold: to prevent juvenile crime; to prevent juvenile victimization; and to help parents control their children.

The police chief explicitly informed the Council that his department was not able to produce statistical data to support the need for the curfew. (Joint Appendix in the Fourth Circuit Court of Appeals [hereinafter "JA"] 518). In fact, there was no evidence in either the legislative or trial record that juvenile crime was occurring disproportionately during curfew hours. (JA 519). To the contrary, the evidence established that juvenile crime tends to occur most heavily in the afternoon hours after school. (JA 456) Moreover, the evidence at trial showed that crime in general decreased in the

year prior to the curfew. [1] (JA 607). Similarly, there was no evidence in either the legislative or trial record that juveniles are more likely to be victimized by non-family members during curfew hours. Instead, again, the evidence was to the contrary, that such victimization tended to occur primarily in the after-school hours (JA 346-47), although there was testimony that darkness is dangerous (JA 98). Finally, there is no evidence in the legislative or trial record that curfews are needed or desired by parents for the purpose of controlling their children. Instead, there was again only evidence to the contrary. (E.g., JA 96-97, 100, 101, 264-65).

The sole African-American on the council opposed the ordinance, citing concerns over racial motivation, effects, and enforcement. The president of a predominantly black housing

---

[1] The majority below states, "City Police officers and Charlottesville's Commonwealth's Attorney confirmed that the most serious crimes committed by juveniles occurred during curfew hours." (Slip. Op. at 10). Petitioners know of no such confirmation. In fact, the Commonwealth Attorney, when asked whether he had any evidence to show when juvenile crime occurs, answered he did not. (JA 65-66). The majority also states, "the City Council considered evidence that juvenile offenses occurring in Charlottesville between 11:00 p.m. and 6:00 a.m. increased by thirty-eight percent during 1995 and a further ten percent during 1996." (Slip. Op. at 10). Yet the only evidence concerning these (greater than curfew) hours was that juvenile crime was higher during *certain portions of 1995 than other portions*, and higher during *certain portions of 1996 than other portions*. In fact, contrary to the court's assumption, the testimony was that overall juvenile offenses were lower in 1996 than in 1995. (JA 574). Additional evidence further documents the majority's apparent statistical misunderstandings. (E.g., JA 607).

project described the opposition felt by the residents and their teenage children who feared getting jobs after school that could cause them nightly to have to interact with police as they returned. As she described, the children would ask "why do they have to feel like South Africa and have a pass to present to the police when they haven't done anything?" (JA 331)[2]

The curfew provides certain exemptions, including when the minor is accompanied by a parent or involved in an emergency. A minor is also exempted when "attending an activity sponsored by a school, religious, or civic organization, . . . which activity is supervised by adults . . . ," although there is no exemption from being stopped and made to identify the school, religious, or civic organization. There is no definition of "civic organization." A minor is also exempted "when the minor is on an errand at the direction of a parent" so long as the minor can show a writing signed by the parent setting forth nine additional pieces of information including "a brief description of the errand."

A minor is also exempted when "exercising First Amendment rights protected by the United States Constitution, . . ." 17-7(8). As with interpreting "civic organization," there is also no guidance in the ordinance as to what speech and what assembling would constitutes the exercise of First Amendment rights. The chief of police testified at trial,

> . . . I think that the directions to the officers was that

---

[2] The curfew was newly enacted at the time of trial. Of those incident reports already generated, the wording would generally be, "Juvenile out past curfew on University Corner" (JA 619), and "I was patrolling along Prospect Avenue when I spotted a young B/M walking north bound . . . I stopped him . . . " (JA 616), and "Juvenile was in violation of curfew..." (JA 622).

> should there be, it's an obvious demonstrative kind of event where, where we recognize as police officers what Constitutional issues are, that the officers would not be taking any action.

(JA 504). When asked whether "two fifteen-year-old sitting in a coffee shop talking about politics after hours" would be First Amendment activity, he answered probably not (JA 505-06), although, he said, "I doubt whether we would deal with it."

The Commonwealth's Attorney agreed that the officers were not trained as to what constituted First Amendment exercises. (JA 29-30). Moreover, even if the police were so trained, he agreed that without first seizing and questioning the minor, an officer could not distinguish those children on their way to such exercises from those otherwise out and about.

At the hearing in this case, despite the uncontested evidence that the majority of crime in which juveniles are involved is in the hours right after school (JA 456), there was also testimony that a wide variety of curfews are being adopted across the county. (JA 76, 78, 79, 86).

Plaintiffs filed suit under 42 U.S.C. § 1983 seeking declaratory and injunctive relief, which was denied. The district court pronounced the appropriate standard to be intermediate scrutiny and, regardless of standard, held the curfew justified. The decision was appealed to the Fourth Circuit Court of Appeals under 28 U.S.C. § 1301 (b). By a two-to-one decision, the decision was affirmed. Refusing to apply strict scrutiny and despite the absence of evidence to demonstrate a relationship in fact between the curfew and its expressed goals but rather based in part on the city council's entitlement to its "beliefs," the court, by a two-to-one vote, affirmed. The dissent argued for strict scrutiny and concluded that the fundamental liberties which were taken away were not justified by any sufficient showing.

REASONS FOR GRANTING THE WRIT

I.

LOWER COURTS ARE APPLYING WIDELY VARYING ANALYSIS AND REACHING WIDELY VARYING ANSWERS TO THE QUESTIONS PRESENTED IN THIS CURFEW CASE, WHILE THE NUMBERS OF CURFEWS AND CHALLENGES THERETO ARE INCREASING NATIONWIDE.

An ever-increasing number of jurisdictions are beginning to impose curfews upon persons under certain ages for certain hours of the day. (JA 76-79) In at least one instance, the curfew begins as early as 8:00 p.m. (JA. 86). However, not since *Hirabayashi v. United States*, 320 U.S. 81 (1943), and *Korematsu v. United States*, 323 U.S. 214 (1944), involving wartime curfews imposed on persons of Japanese descent, has this Court addressed the constitutionality of a blanket curfew imposed upon a class of individuals. It has never before addressed the constitutionality of an indefinite, non-emergency curfew.

Lacking clear guidance from this Court as to the constitutionality of curfews, the lower court decisions in the area have differed widely as to analysis and results. In one of the earlier decisions to address a curfew similar to that in the present case, *Qutb v. Strauss*, 11 F.3d 488 (5th Cir. 1993), the Fifth Circuit recognized that a classification which disadvantages suspect classes "or impinges on a fundamental right is subject to strict scrutiny." *Id.* at 492 (quoting *Plyler v. Doe*, 457 U.S. 202 (1982)). Furthermore, the court assumed that the curfew did so impinge upon a fundamental right. However, "the plaintiffs concede[d] that the state's interest is compelling," *id*, and the court upheld the curfew.

Four years later, the Ninth Circuit reached the opposite

result. *See Nunez v. City of San Diego*, 114 F.3d 935 (9th Cir. 1997). Like the Fifth Circuit, it concluded that strict scrutiny (not intermediate scrutiny as the district court below had applied) was appropriate because of the fundamental nature of the "right of free movement." In contrast with the Fifth Circuit, however, the Ninth Circuit held that San Diego had failed to show the required "close fit" between its curfew and the problem of juvenile crime. Instead, opined the court, the city had "chosen to deal with the problem by making thousands of . . . innocent juveniles prisoners at night in their homes." *Id.* at 949.

In addition, the court invalidated the curfew on First Amendment grounds, finding the ordinance not to be a reasonable time and place restriction. Finally, the Ninth Circuit ruled in *Nunez* that the curfew placed a "unconstitutional burden on parents' fundamental rights" because it was "an exercise of sweeping state control irrespective of the parents' wishes." In the absence of sufficient justification, the Nunez court held the curfew "violates upon the fundamental rights to rear children without undue interference." *Id.* at 952.

This point was also critical to the federal court that reviewed the District of Columbia's curfew ordinance. *See Hutchins v. District of Columbia*, 942 F. Supp. 665 (D.D.C. 1996). It too applied strict scrutiny and held the curfew impermissibly deprived parents and minors of fundamental freedoms.

This conclusion was initially affirmed by the appellate court. *See Hutchins v. District of Columbia*, 114 F.3d 798 (D.C.Cir. 1998). Splitting widely among themselves, two judges agreed the curfew was unconstitutional, one under strict scrutiny, the other under intermediate review. The dissenting judge applied a rational basis analysis. This decision was then vacated upon the grant of a rehearing en banc. *See id.*, 156 F.3d 167 (D.C.Cir. 1998).

Even while the present case was before the Charlottesville trial court, a similar curfew was being enacted by the city of Allentown, Pennsylvania. It was immediately challenged. However, the district court there explicitly rejected the analysis applied by the Charlottesville court. *See Gaffney v. City of Allentown*, No. 97-4455, 1997 WL 597989 (E.D. Pa. 1997). It noted:

> The District Court for the Western District of Virginia, . . . , when faced with this same issue, ignored the lack of statistical evidence, stating, "[n]o statistical evidence need be presented to 'prove' this point, for it is common knowledge and common sense [that] [c]hildren are peculiarly vulnerable to the dangers of the night hours." *Schleifer v. City of Charlottesville*, 963 F. Supp. 534, 542 (W.D.Va. 1997). This court is not comfortable adjudicating constitutional questions solely on the basis of common knowledge and common sense.

Id. at 4, 1997 WL 597989 at 5. Concluding that the liberty to move freely and the importance of parental control in child rearing are fundamental rights, strict scrutiny was applied. No tight evidentiary nexus was established and the curfew was declared unconstitutional.

A divided panel of the Fourth Circuit has now, despite this lack of supporting evidence, affirmed the trial court in the present case. In so doing, it has rejected the Ninth Circuit analysis in *Nunez*, rejected the analysis by the trial court (and one appellate judge) in the D.C.Circuit in *Hutchins*, differed with the standard applied by the district court in *Allentown*, and even rejected the analysis, although not the result, applied by the Fifth Circuit in *Qutb*, all of which applied strict scrutiny to constitutional analysis of curfews. Instead, the Fourth Circuit majority has held that the standard is "intermediate."

Further, unlike the conclusions reached in *Nunez*, *Hutchins* (including the panel judge who applied intermediate scrutiny), and *Allentown*, the Fourth Circuit, like the Fifth Circuit, has upheld the constitutionality of an indefinite curfew, ruling that, even in the absence of actual statistical or other evidence to show a connection *in fact* with the stated goals,[3] the curfew would *even* survive strict scrutiny.

As a result, First Amendment rights are being chilled daily in Charlottesville as the question of what qualifies as a "First Amendment" exemption is being left utterly to the discretion of the police — as well as to the owners of public establishments who are criminally charged with knowing the difference. *See* Section 17-7 (e). Youthful citizens of Charlottesville are being daily deprived of other fundamental liberties to come and go without having to "show a pass."

Morever, fundamental rights are being deprived of two classes, not one. While minors are being deprived of fundamental liberties, all "parents of minors" are also being deprived of their parental liberties, the city usurping part of their function by fiat. In the words of the dissent, "the ordinance was purposefully designed to displace parental discretion with the will of the City Council." Slip Op. at 42.

As discussed more fully below, the Fourth Circuit majority has both misunderstood the status of minors under the First and Fourteenth Amendment and undervalued the fundamental rights of parents.

---

[3] See note 1 *supra*.

II.

CHARLOTTESVILLE'S CURFEW BOTH DEPRIVES PARENTS OF FUNDAMENTAL RIGHTS IN CHILD-REARING AND DEPRIVES ITS YOUTHFUL CITIZENS OF RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENT.

A. The curfew deprives parents of their historically fundamental right to direct the rearing of their children in the absence of a showing of need for this interference.

As recently as 1997, on the issue of Internet regulation, this Court once again acknowledged its "consistent recognition of the principle that the parents' claim to authority in their own households to direct the rearing of their children is basic in the structure of our society." *Reno v. ACLU*, 117 Sct. 2329, 2341 (1997)(quotations omitted). As the dissent below pointed out, this Court has previously deemed it

> cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparations for obligations the state can neither supply nor hinder.

Bellotti v. Baird, 443 U.S. 622, 638 (1979)(plurality opinion)(*Belotti II*)(quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

The plaintiffs in this case include parents of minors for whom this ordinance is felt to be an infringement on their authority to decide bed times, levels of responsibilities, and related issues in the rearing of their children up to the age of seventeen. (E.g. JA 96, 97, 100, 101, 264-65). Because these rights have been historically recognized as fundamental, they may only be taken away where there is shown a "substantial threat" of harm to the "physical and mental health of the child

or to the public safety, peace, order, or welfare." *Wisconsin v. Yoder*, 406 U.S. 205, 230 (interpreting *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

As noted by the dissent below, as well as by the district court in *Allentown* referring to this Charlottesville case, such showing of "substantial threat," or compelling need, has simply not been made.

The Fourth Circuit majority, however, applied a far different standard to the deprivation of such rights, dismissing these concerns with such deference to Charlottesville officials as, "The City was entitled to *believe* . . . that a nocturnal curfew would promote parental involvement in a child's upbringing." Slip. Op. at 12 (emphasis added). The personal, unsupported *beliefs* of a few councilmen hardly suffices as establishing a compelling interest, or even a strong need in fact.

As the dissent pointed out, the city council's actual purpose was in part to *usurp* parental decisions with which it disagreed. It stated its agenda as using the curfew, to "impose a community-wide standard on parents who are unable or *unwilling* to set such limits." Slip Op. at 42 (emphasis in dissent). As the dissent further noted, "[r]ather than supporting the parental role, this curfew supersedes it. It reflects the 'statist notion that governmental power should supersede parental authority in *all* cases because *some* parents" fail to exercise control over their children. Id. (quoting *Parham v. J.R.*, 442 US. 584, 603 (1979)). This, the dissent agreed, "is repugnant to American tradition." *Id.* (quotations omitted).

This Court should grant a writ of certiorari to restore the fundamental rights of parents in Charlottesville and elsewhere which are being replaced with the personal beliefs and choices of local politicians.

B. ***The curfew discriminates against minors in matters of fundamental freedoms, and is not justified under strict scrutiny, or even lesser scrutiny.***

There can be few rights deemed more essential to a free society than the right to leave ones home and walk about. Indeed, the right innocently to walk and stroll about without police interference has been recognized as one "historically part of the amenities of life as we know them." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972). Freedom of movement is "basic in our scheme of values," *Kent v. Dulles*, 357 U.S. 116, 124 (1958); *see Chicago v. Youkhana*, 213 Ill. Dec. 777, 660 N.E.2d 34, 166 Ill. 2d 537, 216 Ill. Dec. 2, 664 N.E.2d 639, 177 Ill. 2d 440, 227 Ill. Dec. 130, 687 N.E.2d 53, *cert. granted sub nom.Chicago v. Morales*, 118 S.Ct. 1510 (1998).[4] The historical nature of this freedom was described by Justice Douglas:

> In all the states, from the beginning down to the adoption of the Articles of Confederation, the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully . . . to move at will from place to place [within their states], and to have free ingress thereto and egress therefrom.

Aptheker v. Secretary of State, 378 U.S. 500, 520 (Douglas, J., concurring).

In short, deprivation of liberty by legislative house

---

[4] *Chicago v. Morales, cert granted.* 118 S.Ct 1510 (1998), involves a law against "gang" assembling, and raises questions of vagueness and the right to assembly. It was argued before this Court on December 9, 1998.

arrest unquestionably infringes upon an historically fundamental right.

To be sure, the state is not required to treat minors like adults in all instances. But the justification for that disparate treatment is important and often misapplied. As the dissent below explained,

> When [state] interests justify regulation [of minors], they do so not because a minor's constitutional rights are always inferior to those of an adult but rather because the government's specific interests as regards minors are sometimes sufficient to allow a regulation to survive strict scrutiny.

Slip Op. at 34 (emphasis omitted).

Minors are not sub-citizens. Their rights are not age-dependent; rather the state interests may be different for different ages. Yet the constitutional analysis when those rights are deprived is the same for all ages: when fundamental rights are being deprived, strict scrutiny is the standard — regardless of the age — and the government must show a compelling interest directly and narrowly served by the regulation.

If "crime" as a general proposition is a sufficiently compelling reason to impose house arrest on otherwise innocent citizens, then it will be a sufficiently compelling reason to impose house arrest on older citizens, not just those under seventeen. If "crime" overall is a sufficiently compelling reason to impose house arrest for certain hours, it would be even more compelling for those hours with the most crime happens (for juveniles, between 3:00 p.m. and 5:00 p.m.).

Thus, the court below made two critical but related errors. First, it misunderstood the basis for decisions in which

greater state regulation of younger citizens has been allowed, that is, that the cases involved greater state interest, not, as the court believes, lesser constitutional protection. As a result, it diminished these protections by holding the standard to be intermediate. Second, even in applying this lesser standard, it failed seriously even to question much less probe the meager and generalized evidence offered by the city in support of its asserted interests.

Thirty years ago, this court wrote that, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969). They also do not shed their constitutional rights when they step outside their family home even if local politicians have decided they would rather they stayed inside.

C. The curfew leaves individual police and "Establishment" owners to guess as to which meetings and discussions are worthy of First Amendment protection.

In *Coates v. Cincinnati*, 402 U.S. 611 (1971), this Court held that a statute criminalizing the assembly of people on sidewalks in a manner annoying to passers-by was not only unconstitutionally vague but violated the First Amendment right of free association.

In the First Amendment realm, vagueness is even less permissible. *See Turner v. Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). Because the curfew, admittedly, operates in the realm of protected conduct (for which recognition it adopted a "First Amendment" exemption), it

must satisfy a strict vagueness standard so as not to chill the exercise of constitutional rights; it must, moreover,

> demonstrate that the recited harms [to be cured] are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994).

As discussed above, the showing of actual need for the curfew and of the reality of the proffered harms to be cured is weak at best. Moreover, the addition of a "First Amendment" exemption, though possibly laudable in intent, renders the statute not one iota less subjective and vague in its meaning and application. Which conversations and which assemblings are protected and which are not? The Chief of Police does not know. (JA 504-06). The officer on the beat does not know. (JA 29-30).

Indeed, legal scholars could disagree: would the wearing of a political tee-shirt exempt one from the curfew? Would political discussions at a coffee house after hours be exempted? Would meeting on the street to debate the merits of rock bands such as "Fastball" versus "Smash Mouth" or to visit the public library be free of police intrusion?

What is more, parents and "Establishment" owners are criminally charged with knowing these answers as well, since there are criminal sanctions for permitting curfew violations. Could a restaurant owner be punished for allowing a discussion regarding politics? The police chief seemed to think so, but, in a demonstration of the unfettered discretion the statute permits, conceded that, as to such a post-curfew

discussion, "I doubt that we would deal with it." (JA 506).

Either all otherwise legal meetings and discussions are covered or they are not. Yet, if they all are covered, then the First Amendment exemption would very nearly swallow the ordinance itself, leaving as criminal only the false yelling of "fire" and other acts already covered by more narrow, less vague criminal statutes.

If they are *not* all covered, then the curfew *does* criminalize *some* meeting, socializing, and discussion while not others, to be determined by local officials. At this point, the curfew becomes then an impermissible content-based regulation (permitting only what the city or officer chooses to recognize as "First amendment" discussions and assemblies).

In addition, in order to enforce the curfew, officers have to monitor conversations and meetings to know which meetings are exempted. Yet the First Amendment is violated by the very act of having to answer to police as to the subject of a discussion or nature of assembly or organization. *See NAACP v. Alabama*, 377 U.S. 288 (1964)(First Amendment protected privacy of membership).

The fact is that the liberties taken away by the curfew are so intertwined with First Amendment freedoms that there can never be an adequate First Amendment exemption to a curfew, and thus a curfew by its very nature is inconsistent with our guarantees under the First Amendment. It certainly is in the case of the Charlottesville curfew. While it remains on the books, it continues to chill protected First Amendment activities and cannot be allowed to stand.

CONCLUSION

Because of the direct conflicts among the lower courts as to the proper standard and analysis of curfew constitutionality, and because, so long as the curfew remains in effect, the First Amendment and other fundamental freedoms are being lost, the Court should grant this writ and reverse the judgment below. Alternatively, it should hold the case pending the decision of this Court in *City of Chicago v. Morales*, 118 S.Ct. 1510 (1998).

Respectfully submitted,

DEBORAH C. WYATT*
Wyatt & Carter
300 Court Square
Charlottesville, VA 22902
(804) 296-4130

MARY C. BAUER
American Civil Liberties
Union Foundation, VA
6 North 6th Street
Richmond, VA 23219
(804) 644-8080

Attorneys for Petitioners
*Counsel of Record

January 15, 1999

APPENDIX

In The United States District Court,
For the Western District of Virginia
Charlottesville Division.

Daniel SCHLEIFER, et al., Civil Action No. 97-0021-C.
Plaintiffs,

v. MEMORANDUM OPINION

CITY OF CHARLOTTESVILLE,
Defendant.

MICHAEL, District Judge.

This case involves an attack on a recently enacted curfew law by Defendant City of Charlottesville, Virginia; the court has been asked to issue preliminary injunctive relief against the curfew law pursuant to Fed.R.Civ. P. 65(a). After holding a hearing on the matter and considering the parties' oral arguments, memoranda, and evidentiary exhibits, the court concludes that it must presently decline to enjoin the law's operation.

In dealing with any preliminary injunction request, the court is acutely aware of the potential for mischief in acting on such a request. The guiding principles are perhaps best expressed by a case from the Fourth Circuit Court of Appeals where Judge Wilkinson stated: "[G]ranting a preliminary injunction requires that a district court, acting on an incomplete record, order a party to act, or refrain from acting, in a certain way. '[T]he danger of a mistake' in this setting 'is substantial.' " Hughes Network Systems v. InterDigital Communications Corp., 17 F.3d 691, 693 (4th Cir.1994) (quoting American Hosp. Supply Corp. v. Hospital Prods., Ltd., 780 F.2d 589, 593 (7th Cir.1986)). It is particularly difficult to reach reasoned conclusions on what must necessarily be an incomplete and sometimes unbalanced record.

[1] "Where serious issues are before the court, it is a sound idea to maintain the status quo ante litem ...." Feller v. Brock, 802 F.2d 722, 727 (4th Cir.1986) (citing Blackwelder, 550 F.2d

at 194-95). When the injunction that would alter the status quo is mandatory (as opposed to prohibitory), the district court should "sparingly exercise[ ]" its authority. Wetzel v. Edwards, 635 F.2d 283, 286 (4th Cir.1980).

It is important to note with clarity that the observations and conclusions stated herein are based on an incomplete record and cannot represent any final decision on any one of the claims. The court will expatiate on the law involved in these various issues, but does so with the clear recognition that a full evidentiary basis may change entirely the view of the court as to any one of these issues. It is to be hoped that some or all of the observations in this opinion will give guidance to counsel in developing that full evidentiary record. Again, the court cautions that the observations concerning plaintiffs' claims are made on the basis of that incomplete record about which Judge Wilkinson warned.

I. THE CURFEW LAW

Plaintiffs, represented by the American Civil Liberties Union ("ACLU"), are juveniles and their parents [FN1] who request preliminary injunctive relief from Section 17-7 of Chapter 17 of the Charlottesville City Code, which enacts the curfew law (effective March 1, 1997). The purpose of the law is to

FN1. Among the plaintiffs are children below the age of seventeen, an eighteen year old, and their parents. Throughout its opinion, the court will not distinguish between these different groups expressly, because the context will make apparent which group's rights are at issue.

(I) promote the general welfare and protect the general public through the reduction of juvenile violence and crime within the City; (ii) promote the safety and well-*538 being of the City's youngest citizens, ... whose inexperience renders them particularly vulnerable to becoming participants in unlawful activities, particularly unlawful drug activities, and to being

victimized by older perpetrators of crime; and (iii) foster and strengthen parental responsibility for children. See Introduction to s 17-7.

The law, applicable to children under the age of seventeen, sets a curfew of 12:01 a.m. to 5:00 a.m. on Mondays through Fridays and 1:00 a.m. to 5:00 a.m. on Saturdays and Sundays. During these hours, children are not permitted "to remain in or upon any Public Place within the City, to remain in any motor vehicle operating or parked therein or thereon, or to remain in or upon the premises of any Establishment within the City ..." Id. s 17- 7(b). Parents are prohibited from aiding violations of the law. Id. s 17-7(c). Eight exceptions are provided. Minors are not bound by the curfew when: (1) they are accompanied by parents; (2) they are out because of an emergency; (3) they are engaged in employment activity, leaving from such activity, or going to such activity; (4) they are directly outside of their residences where their parents reside; (5) they are attending activities supervised by an adult and sponsored by a school, religious organization, civic organization, public agency, or a similar organization; (6) they are on an errand on behalf of their parents and have an appropriate authorizing note; (7) they are engaging in interstate travel; or (8) they are exercising rights under the First Amendment, such as free exercise of religion, speech, or assembly. Id. s 17-7(b)(1)-(8). A minor who violates the curfew law but who has never before received a warning will receive only a warning from an enforcing police officer. Id. s 17-7(g)(1)(A)(1). However, a minor who has previously received a warning will be charged with violating the curfew law and will be issued a summons to appear in court for the violation. Id. s 17-7(g)(1)(A)(2). The law directs the arresting officer to release the child into the custody of a parent as soon as is practicable or to place the child into a temporary care facility, so that a parent can retrieve the child. Id. s 17-7(g)(1)(B).

II. SUMMARY OF PLAINTIFFS' ARGUMENTS

AGAINST THE CURFEW LAW

Plaintiffs argue that the curfew law infringes upon various rights guaranteed them under the United States Constitution, such as freedom of movement and freedom from undue government interference in child-rearing, both of which derive from the Due Process Clause of the Fourteenth Amendment; [FN2] rights guaranteed under the First Amendment; [FN3] the Fourth Amendment; [FN4] and the Equal Protection Clause of the Fourteenth Amendment. [FN5] Further, plaintiffs contend the curfew law is void for vagueness because its defenses (or exceptions) give insufficient guidance to plaintiffs and enforcement officials as to which activities are exempt from the curfew law.

FN2. The Due Process Clause of the Fourteenth Amendment provides that no person shall be deprived of "life, liberty, or property, without due process of the law." U.S. Const. amend. IV.

FN3. The First Amendment prohibits Congress from making any "law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend I. The First Amendment was made applicable to the states through the Fourteenth Amendment; the same is true of the Fourth Amendment. See Laurence H. Tribe, American Constitutional Law s 11-2 (2d ed.1988).

FN4. The Fourth Amendment guards against "unreasonable searches and seizures" and warrants not based on "probable cause." U.S. Const. amend. IV.

FN5. The Fourteenth Amendment's Equal Protection Clause states that no person shall be denied "equal protection of the

laws." U.S. Const. amend. IV.

The following are activities of which the juvenile plaintiffs claim they will be deprived during curfew hours: (1) going to City Council meetings; (2) attending concerts and movies (such as Star Wars and The English Patient); (3) socializing with friends at coffee houses and dance parties ("raves"); (4) participating in band or theater activities; (5) *539 eating; and (6) swimming and ice skating. Although plaintiffs speculate that other activities, such as late-night church and Alcoholics Anonymous meetings are threatened by the curfew law, none of the plaintiffs claim to be late-night church goers or recovering alcoholics.

III. STANDARD GOVERNING PRELIMINARY INJUNCTIONS

[2][3] The following articulation of the law on preliminary injunctions is taken, virtually verbatim, from this court's opinion in Betts v. Rector & Visitors of the University of Virginia, 939 F.Supp. 461, 465 (W.D.Va.1996). Plaintiffs' motion for a preliminary injunction is governed by the test articulated in Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189, 196 (4th Cir.1977), pursuant to which the court must take into account four factors, the weight given to each to be determined by the strength of the other factors. First, the court must make a finding that plaintiffs will suffer irreparable injury if the court declines to grant injunctive relief. After this determination has been made, the court must assess the likelihood of harm to defendant if the court issues an injunction against it and then balance this harm against the injury plaintiffs will suffer if they are denied injunctive relief. Subsequently, the court must establish that plaintiffs are likely to succeed on the merits, or if the balance in the previous step clearly favors plaintiffs, the court need only satisfy itself that plaintiffs have raised substantial and serious questions on the merits. Finally, public interest must be considered in the analysis.

Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 551 (4th Cir.1994) (quoting Direx Israel, Ltd. v. Breakthrough Med. Corp., 952 F.2d 802, 812-13 (4th Cir.1991)).

A. LIKELIHOOD OF SUCCESS ON THE MERITS

Because the merits of plaintiffs' case will, in large part, determine where the remaining Blackwelder factors lie, the court will first address the likelihood that plaintiffs will succeed on their claims. Most of the challenges to curfew laws have taken place at the state level. However, two recent important decisions discussing the constitutionality of curfew laws come from federal courts-one from the district court in the District of Columbia, Hutchins v. District of Columbia, 942 F.Supp. 665 (D.D.C.1996), and the other from the Fifth Circuit Court of Appeals, Qutb v. Strauss, 11 F.3d 488 (5th Cir.1993). These cases are luxurious precedent, for both analyze curfew laws almost identical to the curfew law under attack before this court. Hutchins struck down the curfew law, based upon a conclusion that the law infringed the constitutional rights of minors and their parents; the latter were found to have been unconstitutionally deprived of their right to rear children without undue governmental interference, and the former were found to have been unconstitutionally constrained in their right of free movement. The Fifth Circuit in Qutb, in contrast determined that the curfew law should be upheld; the Fifth Circuit concluded that any infringement on the rights of parents was minimal and that the constraint on the free movement rights of minors was justifiable. The court finds both cases helpful, and, although the court agrees with the conclusion reached by the Fifth Circuit, the court does not follow the precise analysis of Qutb. The court holds, for the reasons stated below, that plaintiffs are unlikely to succeed on the merits of any their claims and that plaintiffs have not raised serious or substantial questions on the merits of their claims.

1. STANDARD OF REVIEW FOR CONSTITUTIONAL CHALLENGE

[4][5][6] Most laws passed by Congress are reviewed under the "rational basis" test, also known as the "roll-over-and-play-dead" test, because so long as the challenged legislation "bear[s] some rational relationship to legitimate state purposes," and there is some reasonable basis for the classification, courts will uphold the legislation. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40, 93 S.Ct. 1278, 1284, 36 L.Ed.2d 16 (1973). If, however, a law "operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution," strict scrutiny *540 judicial review is required. Id. at 17, 93 S.Ct. at 1288; Plyler v. Doe, 457 U.S. 202, 216-17, 102 S.Ct. 2382, 2394-95, 72 L.Ed.2d 786 (1982). [FN6]

To survive strict scrutiny, the classification must (1) promote a compelling government interest and (2) be narrowly tailored to that interest. Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322, 1331, 22 L.Ed.2d 600 (1969). A law is narrowly tailored if it employs the least restrictive means to achieve its goal, Qutb, 11 F.3d at 492, and if there is an evidentiary nexus between the government's compelling interest and the classification. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

FN6. A lower level of scrutiny, intermediate scrutiny, is applied to certain classifications, for instance ones based on sex. See, e.g., Michael M. v. Superior Court, 450 U.S. 464, 468, 101 S.Ct. 1200, 1204, 67 L.Ed.2d 437 (1981).

[7] To the extent that the constitutional rights of children--and not adults--are implicated by a given law, the above analysis does not necessarily govern. This is because constitutional protections accorded children and adults have never been

co-extensive.

See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, ----, 115 S.Ct. 2386, 2391, 132 L.Ed.2d 564 (1995) (Scalia, J.) ("Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination-including even the right of liberty in its narrowest sense, i.e., the right to come and go to will."); Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (Brennan, J.). Of course, constitutional protections are not triggered only when an individual comes of age, and children, like other people, indisputably have rights under the Constitution. See Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976). Thus, in Bellotti v. Baird, 443 U.S. 622, 633, 99 S.Ct. 3035, 3042-43, 61 L.Ed.2d 797 (1979), the Supreme Court struck down a state statute requiring a minor to procure parental consent before obtaining an abortion, because that statute unduly burdened a minor's constitutional right to abortion. In reaching this conclusion, however, the Supreme Court was careful to conduct an analysis tailored to the age of the burdened group, rather than simply applying the same strict scrutiny standard governing laws infringing fundamental rights of adults. Bending to the dictates of common sense, the Supreme Court recognized that the behavior of minors may be constitutionally regulated more stringently than that of adults. The Court in Bellotti explained that "the constitutional rights of children cannot be equated with those of adults" because of "[(1)] the peculiar vulnerability of children; [(2)] their inability to make critical decisions in an informed, mature manner, and [(3)] the importance of the parental role in child rearing." Id. at 634, 99 S.Ct. at 3043. In articulating these factors, Bellotti drew upon Ginsberg, 390 U.S. at 634-43, 88 S.Ct. at 1277-83, and Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), both of which manifested a willingness to permit states greater regulatory leeway based on the special

status of children in our society. In Ginsberg, the Supreme Court sanctioned a law that, if applied to adults, would have violated the First Amendment; a law criminalizing sale of sexually explicit magazines to minors survived constitutional challenge, even though the same law could not have been constitutionally applied to adults. 390 U.S. at 634, 88 S.Ct. at 1277. Justice Brennan, speaking for the Court, explained that the state must be permitted to adjust its laws to "social realities," id. at 638, 88 S.Ct. at 1279 (internal quotations and citations omitted), i.e. that children simply cannot be treated exactly the same as adults. Hence, the Court reiterated that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." Id. (internal quotations and citations omitted). Similarly, in Prince, the Supreme Court upheld the conviction of an adult who violated a child-labor statute by permitting a willing child (her ward) to sell religious literature on the street. Of course, a law categorically prohibiting adults from distributing religious literature would not have passed constitutional muster. Id. at 167, 64 S.Ct. at 442-43. "But," cautioned the Court, "the mere fact that a state could not wholly prohibit this form of adult activity, *541 ... does not mean it cannot do so for children." Id. at 168, 64 S.Ct. at 443. The opposite conclusion would mean that a state could impose no greater limitation upon child labor than adult labor. Or, if an adult were free to enter dance halls, saloons, and disreputable places generally, in order to discharge his conceived religious duty to admonish or dissuade persons from frequenting such places, so would be a child with similar convictions or objectives, if not alone then in the parent's company, against the state's command. Id.

Although Supreme Court precedent makes clear that children and adults may be treated differently under the Constitution, the doctrinal implications of this difference remain unsettled. See Hutchins, 942 F.Supp. at 672 & n. 11 (citing different ways in which courts have applied Bellotti). Some courts have held

that certain fundamental rights constitutionally guaranteed adults are not fundamental when it comes to minors, see In re J.M., 768 P.2d 219, 223 (Colo.1989); City of Panora v. Simmons, 445 N.W.2d 363, 368 (Iowa 1989); other courts have applied Bellotti to determine whether the state interest is compelling, see Allen v. City of Bordentown, 216 N.J.Super. 557, 524 A.2d 478, 486 (1987); cf. Qutb, 11 F.3d at 492 n. 6; still other courts have held that a state could impinge upon fundamental rights of minors if its interest was "significant," but not necessarily compelling, see In the Matter of the Appeal In Maricopa County, 181 Ariz. 69, 887 P.2d 599, 605 (App.1995); cf. Johnson v. City of Opelousas, 658 F.2d 1065, 1073 (5th Cir. Unit A Oct.1981).

[8] After examining these various methods, the court concludes that the most sensible approach, and one most closely aligned with the Supreme Court's reasoning, is simply to accord the state more regulatory latitude in governing children in certain circumstances. When the Bellotti factors (the minor's vulnerability, inexperience in decisionmaking, or need for parental guidance) cut in favor of increased state oversight, the state's burden of proof should be somewhere below that required by strict scrutiny review (i.e., a showing that the challenged law is narrowly tailored to a compelling state interest). Lowering the standard of review--rather than denying the existence of a bare right--conforms to the Supreme Court's general equal protection analysis as well as the Court's statements regarding state regulation of minors. The Supreme Court generally seems to presume that the guarantees of the Bill of Rights may be invoked by all people; this presumption accords with the constitutional text, which does not restrict its protections to isolated groups of individuals. Yet the presumption of equal treatment under the Constitution is somewhat diluted by the sliding scale of scrutiny employed by the Supreme Court, depending on the characteristics of the individual seeking constitutional protection. For instance,

race-based classifications face the toughest battle (strict scrutiny); distinctions based on gender are examined somewhat less closely (intermediate scrutiny); and laws that benefit one age group over another receive little serious attention. See Laurence H. Tribe, American Constitutional Law ss 16-1 to 16-25 (2d ed.1988). The Supreme Court has given some indication that laws impinging on constitutional rights of minors should be analyzed in a similar fashion. In Bellotti, the Court remarked that "although children are protected by the same constitutional guarantees ... the State is entitled to adjust its legal system to account for children's vulnerability." 443 U.S. at 635, 99 S.Ct. at 3044. In practical terms, this means that the "test ... [should be] less rigorous than the 'compelling state interest' test applied to restrictions on the ... [constitutional] rights of adults ....[l]esser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, ... and the law has generally regarded minors as having a lesser capability for making important decisions." Carey v. Population Servs., Int'l, 431 U.S. 678, 693 n. 15, 97 S.Ct. 2010, 2020 n. 15, 52 L.Ed.2d 675 (1977) (citations omitted). Thus, "[s]tate restrictions inhibiting the ... rights of minors are valid only if they serve 'any significant state interest ... that is not present in the case of an adult.' " Carey, 431 U.S. at 693, 97 S.Ct. at 2020 (quoting *542 Danforth, 428 U.S. at 75, 96 S.Ct. at 2844). Thus, "significant interest" displaces "compelling interest." The court takes "lesser scrutiny" also to mean that instead of requiring that the restriction be narrowly tailored, courts should ensure that there be a substantial fit between means and ends. Cf. Craig v. Boren, 429 U.S. 190, 197, 97 S.Ct. 451, 457, 50 L.Ed.2d 397 (1976) (stating that a gender classification will be upheld only if it serves an "important governmental objective[ ]" and is "substantially related to achievement of [that] objective[ ]").

a. THE BELLOTTI FACTORS APPLY HERE

[9] Plaintiffs, supported by the district court in the District of

Columbia, which applied strict scrutiny review, see Hutchins, 942 F.Supp. at 672-74, argue that the Bellotti factors should not affect the level of scrutiny in this context. The court must part company with the court in Hutchins, as it appears clear to this court that the Bellotti factors justify a less stringent standard of review in this case. As to the first Bellotti factor, the Supreme Court has already affirmed what most parents must know: "possible harms arising from ... activities subject to all diverse influences of the street" pose more danger to children than to adults. Prince, 321 U.S. at 168, 64 S.Ct. at 443. Even though "children have rights, in common with older people, in the primary use of highways. .... in such use streets afford dangers for them not affecting adults." Id. at 169, 64 S.Ct. at 443. Of course, youth below the age of seventeen are more vulnerable to night life--and the assaults, drugs, and sex that go with it-- than adults. No statistical evidence need be presented to "prove" this point, for it is common knowledge and common sense. Children are peculiarly vulnerable to the dangers of the night hours during which the curfew law is in effect.

In addition to the first Bellotti factor, the second Bellotti factor- children's inability to make critical decisions in an informed matter-also justifies imposition of a lower burden of proof upon the government. The court cannot accept plaintiffs' argument that leaving their homes after curfew hours does not qualify as a critical decision within the meaning of Bellotti. Of course, on an isolated night, a decision to go out after curfew hours may not be a critical decision, but rather one of minimal importance; but that decision, made night after night, might have an adverse effect on a child's life. Without the curfew, children may well choose to roam the City streets nightly, thus endangering their lives (or the lives of others), exposing themselves to insidious blandishments, and losing sleep to the detriment of their scholarly studies. Given these possible consequences, the court believes the decision to leave one's doorstep, seemingly superficial, may actually be crucially

important.

Finally, the importance of the parental role in child-rearing, the third Bellotti factor provides yet another reason for the court to review the curfew law with more leniency. Plaintiffs view the curfew as an unwelcome intrusion into the relationship between parent and child and, consequently, urge that, if anything, the third Bellotti factor cuts against employing anything but strict scrutiny review. Unfortunately, the court believes that plaintiffs take too rosy a view of the parent-child relationship in America today. The court agrees with Charlottesville's legislative body (which represents the City's citizens) that the curfew supplies parents with a tool to reinforce their authority. See Maricopa County, 887 P.2d at 607 (finding, based on its experience, that curfew laws provide badly needed support for parents). Even if, however, the curfew law intrudes upon parental authority, the former two Bellotti factors (alone or together) clearly support a standard of review that is less demanding than strict scrutiny.

2. FREEDOM OF MOVEMENT

[10] Freedom of movement, "basic in our scheme of values," Kent v. Dulles, 357 U.S. 116, 124, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958), is a fundamental right guaranteed adults by the Constitution. See, e.g., Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 164, 92 S.Ct. 839, 844, 31 L.Ed.2d 110 (1972). There has been some disagreement as to *543 whether freedom of movement is a fundamental right for minors. Compare Hutchins, 942 F.Supp. at 672 (holding that minors who are not in the possession of the state have a fundamental right to free movement), with Bykofsky v. Borough of Middletown, 401 F.Supp. 1242, 1253-58 (M.D.Pa.1975) (applying the rational basis test to a claim that the rights of free movement had been restricted by a curfew targeting minors), aff'd mem., 535 F.2d 1245 (3d Cir.1975). As discussed above, the court will assume minors

have the same right to free movement as do adults. Further, the court accepts plaintiffs' contention that the curfew law impinges upon their right to free movement. Hence, the only remaining issue is whether the law will likely survive the applicable standard of review, which standard is less stringent than strict scrutiny. This question is easy for the court, because the court finds that the infringement on minors' rights to freedom of movement would likely pass constitutional muster even under strict scrutiny review. For the benefit of a future reviewing court, the court conducts a strict scrutiny review analysis (though it holds that the curfew law need not pass this stringent standard of review to survive plaintiffs' challenge).

a. COMPELLING INTEREST

Protecting the safety and well-being of children and reducing juvenile crime are unquestionably compelling state interests. [FN7] See e.g., Qutb, 11 F.3d at 492 (quoting Hodgson v. Minnesota, 497 U.S. 417, 444, 110 S.Ct. 2926, 2941-42, 111 L.Ed.2d 344 (1990) ("[The state] has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.")); Hutchins, 942 F.Supp. at 674 (finding that extirpation of juvenile crime and violence and reduction of juvenile victimization constitute compelling state interests).

FN7. The curfew law also lists as one of its objectives the solidification of the parent/child relationship. The court need not decide whether this is a significant or compelling state interest (though, if it had to decide, the court would answer in the affirmative), because juvenile crime reduction and protection so obviously are significant and compelling state interests.

b. NARROW TAILORING

The court does not anticipate that the necessary connection between these compelling state interests and the means chosen by the curfew law will be revealed as too attenuated; based on the information before it, the curfew law employs the least

restrictive means available.

The Fifth Circuit in Qutb concluded that the "distinction based upon age furthers the[ ] objectives [of juvenile crime reduction and juvenile victimization]." 11 F.3d at 493. The Fifth Circuit found that the following data were sufficient to demonstrate the requisite nexus.

Juvenile crime increases proportionally with age between ten years old and sixteen years old ... In 1989, Dallas recorded 5,160 juvenile arrests, while in 1990 there were 5,425 juvenile arrests. In 1990 there were forty murders, ninety-one sex offenses, 233 robberies, and 230 aggravated assaults committed by juveniles. From January 1991 through April 1991, juveniles were arrested for twenty-one murders, thirty sex offenses, 128 robberies, 107 aggravated assaults, and 1,042 crimes against property. [Murders and rapes are most likely to occur at night in public places, and one-third of robberies occur on streets and highways.] Id.

Responding to the plaintiff's complaints that these statistics were insufficient for their failure to document a nocturnal juvenile crime problem or to show the curfew's effectiveness, the Fifth Circuit stated as follows.

We will not ... insist upon detailed studies of the precise severity, nature, and characteristics of the juvenile crime problem in analyzing whether the [curfew law] meets constitutional muster when it is conceded that the juvenile crime problem in Dallas constitutes a compelling state interest. In this same vein, the plaintiff[']s arguments that the city has not produced proof of the effectiveness of the ordinance in addressing the juvenile crime problem are unavailing; *544 indeed, such 'proof' can hardly amount to more than mere speculation. Federal courts have always been reluctant to question the potential effectiveness of legislative remedies designed to address societal problems. As [has been] held in other contexts, [courts] 'do not demand of legislatures scientifically certain criteria of legislation.' Id. at 493 n. 7

(quoting Ginsberg, 390 U.S. at 642-43, 88 S.Ct. at 1282).

In addition to determining that the requisite nexus between purpose and classification had been established, Qutb concluded that the state had employed the least restrictive methods to achieve its goal, largely because of the exceptions carved out of the law (identical to those provided by the curfew law challenged here).

i. EVIDENTIARY NEXUS

The only difference between our case and Qutb lies in the data; obviously, the statistics considered by the legislature in Dallas are not identical to the materials reviewed by the City of Charlottesville government. Charlottesville's legislative body, before enacting the Curfew Law, held several public hearings and heard arguments and opinions from parents, children, police officers, prosecutors, and other citizens. The City's Police Chief voiced approval for a curfew, because, based on his experience, he believed the curfew would make the City safer. The Chiefs fellow officers concurred. Other Charlottesville residents chimed in, describing late-night disturbances by unruly youth. A principal and school counselor attested that unauthorized nightly wanderings diminished the capacity of children's ability to learn. [FN8] Finally, a college professor and consultant who is an expert on curfews offered nationwide statistics to back up the City.

FN8. Plaintiffs object to the affidavits of educators that so state because, plaintiffs contend, their attestations do not appear to be based upon personal knowledge. The court, however, is confident that experienced and concerned educators have taken the time to learn the causes for students' poorer performances and are familiar with their students' extra- curricular activities.

Dr. William J. Ruefle provided the following information. Juvenile arrests for serious violent crime increased by 30% between 1986 and 1995; juvenile arrests for property crimes

increased by 11%; and juvenile arrests for all other crimes increased by 111%. In 1995, 2.75 million juveniles were arrested. Experts expect such arrests to increase in the future, based on current demographic trends. These national trends hold true for Virginia, where juveniles commit serious violent crimes at a higher rate than adults. Juveniles are also at great risk of being crime victims. Curfews have become a popular and commonly-used tool to battle against such grim statistics by restraining children and placing responsibility on parents; the curfew law in Charlottesville appears to be among the most modest and lenient of the myriad curfew laws implemented nationwide. See Affidavit of Dr. William J. Ruefle, Exhibit C-8 of Defendant's Opposition Brief During the hearing held before the court, Dr. Ruefle confirmed that the trends in Charlottesville mirror the nationwide trends; according to Dr. Ruefle, Charlottesville's juvenile crime rate, as well as that in Virginia and in the nation, is on the rise.

Charlottesville's Commonwealth Attorney, Mr. Chapman, reinforced Dr. Ruefle's testimony, explaining that his own experience had taught him that juvenile crime was on the rise in Charlottesville. He provided statistics of juvenile delinquency cases (dating from 1991 to 1996) to back up his assertions. Further, Mr. Chapman testified that even if many crimes take place during the day, the most serious crimes (for instance, ones involving violence and drugs) occur during night time hours.

The information provided by the City thus far adequately demonstrates a nexus between the City's goal-juvenile protection and juvenile crime reduction--and the classification--children under the age of seventeen. In arguing to the contrary, plaintiffs wish to impose improperly stringent standards upon the City. For instance, plaintiffs urge that the City's interests (protection of juveniles and juvenile crime reduction) will not be advanced by the curfew law because there is no evidence that most crimes (by juveniles) are committed at night. But, as discussed *545 above, Mr. Chapman testified

that most serious crimes occur at night.

Moreover, any person who has lived in the United States and has occasionally read newspapers understands the dangers of night life in all too many of American cities.

In the same vein, as plaintiffs must realize, neither the court nor the City could accept plaintiffs' suggestion that a curfew law with the requisite nexus would apply only to males, would include all ages up to thirty, and would apply between the hours of 7:00 p.m. to 7:00 a.m. See Plaintiffs' Memorandum at 21 n. 4. Not only do plaintiffs concede--in the same breath that they suggest this alternative-that their version of the "ideal" curfew law would be unconstitutional, but they also take the extreme position that the more intrusive law which would include adults would be sufficiently tailored to the goal of preventing harm to and by juveniles. Although less extreme, plaintiff's criticism of the law for excluding seventeen year olds--who commit a substantial portion of juvenile offenses-must be rejected. The City made a legislative judgment that the costs of imposing a curfew on seventeen year olds would outweigh any consequent benefits of including them within the curfew. Cf. Bykofsky, 401 F.Supp. at 1266 ("Obviously, the older the persons being regulated, the greater the burden on the state to justify the regulation in terms of reasonableness, and there would come an age beyond which a nocturnal curfew could not be consti-constitutionally applied, absent extraordinary or emergency circumstances."). It is not for this court to fault the City for failing to enact an even broader curfew, and the court finds it odd that plaintiffs would take the position that a broader curfew would be more palatable.

Relatedly, plaintiffs' attack upon the statistical information and testimonial evidence offered by the City is unlikely to be fatal to the curfew law. Plaintiffs complain that seventeen year olds are not governed by the curfew law even though they are included in the statistical grouping relied upon by the City. At the hearing, Mr. Chapman indicated that the inclusion of

seventeen year olds did not distort the statistics. Next, plaintiffs point out that the statistics relied upon are national, and not specific to the City of Charlottesville. Again, testimony by Dr. Ruefle and Mr. Chapman dilutes the strength of this argument, as both testified that the national statistics accurately reflect Charlottesville's crime problem. Finally, plaintiffs argue that the City's statistics documenting the number of nightly arrests are unhelpful; the number of nightly arrests, so the argument runs, says little of how many crimes are committed at night, because crimes and arrests are not synonymous. This argument is unpersuasive; there may not necessarily be a perfect overlap between crimes and arrests, but one can safely assume that one follows the other in the usual case. Furthermore plaintiffs ignore the testimonial evidence which belies any claim that nightly crime is not a major problem in Charlottesville; there is no constitutional requirement that statistics be adduced to demonstrate a dose nexus between ends and means, and the City's citizens testimony cannot be excluded from the calculus.

More fundamentally, the Supreme Court has rejected the notion that legislatures must produce scientifically exact support for their factual conclusions, and the Fifth Circuit in Qutb squarely held that even strict scrutiny analysis does not demand such precision. See Qutb, 11 F.3d at 493 n. 7 (quoting Ginsberg, 390 U.S. at 642, 88 S.Ct. at 1282). The court agrees with Qutb on this point, and finds that the factual support adduced to support Charlottesville's curfew law is at least as persuasive (if not more so) as that proffered by the Dallas legislature.

At this stage the court feels it is appropriate to comment upon the analysis in Hutchins. As mentioned above, the district court in Hutchins decided that the Bellow factors did not dictate different treatment of children and adults in the context of a curfew law and applied strict scrutiny review to the law. The district court purported to distinguish its case from Qutb (which also applied strict scrutiny review) because of the statistics

adduced by the District of Columbia. With all due respect, the court has trouble seeing any dispositive distinction between the statistics upon which Dallas relied and those upon which the District of Columbia. Not surprisingly, the statistics submitted by the *546 District of Columbia were imperfect: for instance, they did not indicate which percentage of crimes were committed during night hours, and they included eighteen year olds in their calculations.

But such deficiencies, in this court's view, are not of constitutional significance, particularly when the District of Columbia offered the district court a wide array of data from various different sources to support a sadly uncontrovertible fact: the crime rate by juveniles in the District of Columbia is staggering by any definition. Cf. Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51-52, 106 S.Ct. 925, 931, 89 L.Ed.2d 29 (1986) (stating that in demonstrating a substantial government interest, a city is "entitled to rely on the experiences of ... other cities" in enacting an adult theater ordinance, as the First Amendment "does not require a city ... to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); Steelworkers v. Weber, 443 U.S. 193, 198 n. 1, 99 S.Ct. 2721, 2725 n. 1, 61 L.Ed.2d 480 (1979) ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."). This court believes the court in Hutchins did precisely what it disavowed: it "demanded that [ ] the District [of Columbia] produce
'scientifically certain criteria of legislation.' " 942 F.Supp. at 678 (quoting Ginsberg, 390 U.S. at 643, 88 S.Ct. at 1282). The court cannot follow in these footsteps.

ii. LEAST RESTRICTIVE MEANS

Largely for the same reasons as those given in Qutb, the court holds that the least restrictive means were likely used to

advance the City's goal. First, the curfew law affects conduct during only four or five hours each night. Second, the curfew law attempts, as best it can without gutting the law, to accommodate the needs of its youth and their parents. [FN9] Employment, religious, school, civic, and like activities are essentially exempted. Emergencies and even late-night errands are permitted. Interstate travel and the First Amendment, by the terms of the curfew law, are beyond the scope of the law. And, if a parent wishes--for any reason at all--to venture outside with his or her child after 12:01 a.m. or 1:00 a.m. (as the case may be), the parent may do so; if the child desires a breath of fresh air or has an urge to star-gaze, he or she may do so, with or without the parent, so long as the child remains on a sidewalk adjoining his or her residence. [FN10]

FN9. The court discusses below plaintiffs' objections (on vagueness grounds) to the exceptions.

FN10. Plaintiffs contend that they cannot take advantage of these many exceptions because they fear police officers; but this argument suffers from an unacceptable and unsupported assumption that police officers will overstep their proper authority.

There is no evidence that police officers will not properly enforce the curfew law, and the court surely will not assume this to be true absent very strong evidence so indicating.

iii. SUMMARY

Because the court has found that the curfew law probably will survive strict scrutiny review vis-a-vis the plaintiffs' fundamental right of free movement challenge, the court holds that plaintiffs have not raised serious and substantial questions on the merits of this claim and likely will not prevail on the merits as to this claim.

3. PARENTING RIGHTS

[11][12] The Constitution protects parents against "undue, adverse interference by the State" in child-rearing. Bellotti, 443 U.S. at 639 n. 18, 99 S.Ct. at 3046 n. 18 (citing cases); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Plaintiffs insist that the curfew law unconstitutionally usurps parental authority because it constrains a parent's right to authorize a child to go outside during curfew hours at will. Plaintiffs' mistake lies with their interpretation of the word "right," which they seem to take as absolute.

But even the most fundamental "right" seldom comes with such *547 few conditions. The right of parents to raise their children without government incursions is tempered by an important qualification: the government may intrude, so long as the intrusion is not unreasonable. Thus, a parent, no matter how well-intentioned, may not be able to override a child labor law, even for religious purposes, see Prince, 321 U.S. at 170, 64 S.Ct. at 444 ("Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children ...."); may not insist that his or her under-age child be sold cigarettes or served alcohol; and may not demand that a state permit his or her fourteen year old to drive. The state has an independent interest in the safety and well-being of children, and, consequently, a parent's desire to raise his or her child in accordance with certain principles cannot always trump state laws. See Bykofsky, 401 F.Supp. at 1262-64.

The curfew law harbors no grand scheme to supplant parental authority or governance of children; its ambitions are far more modest. Under its framework parents retain discretion in the majority of cases. As the Fifth Circuit in Qutb pointed out, parents can accompany their children outside for whatever

reason they wish, and their children are generally permitted to engage in church, school, civic, and like activities. Further, jobs, emergencies, and parental errands qualify as exemptions to the curfew law. Children may exercise their First Amendment rights and may not be prohibited from engaging in interstate travel. The only thing that parents cannot do is authorize their children to go outside when none of these exceptions apply. Such circumstances, undoubtedly, will be rather limited. See Qutb, 11 F.3d at 495-96; Bykofsky, 401 F.Supp. at 1264. The plaintiffs' affidavits themselves repeatedly emphasize that only on very rare occasions do the parents of the juvenile plaintiffs allow their children to leave the house after midnight or 1:00 a.m. [FN11]

FN11. Along these lines, the court would be interested to learn whether any churches or synagogues operate during curfew hours and, if so, how often this occurs. Similarly, it would be interesting to tally the frequency of political rallies or gatherings that take place after midnight or 1:00 a.m.

In such circumstances where a parent, but for the curfew law, would permit his or her child to attend an all-night "rave" party or to slip out for an unchaperoned midnight soda, no doubt that parent's "right" is restricted. But the restriction is minimal and not one of constitutional significance. This should become particularly apparent when one considers the gravity of the countervailing government interest: preventing children below the age of seventeen from wandering the streets late at night, where they might become victims or perpetrators of crime. [FN12] The court in Bykofsky aptly stated the implications of this analysis.

FN12. Contrary to plaintiffs' suggestion, the City of Charlottesville is not necessarily operating under any insulting assumption that children below the age of seventeen are all driven by ill-will or bad motives and that their parents have abdicated parental responsibility. Rather, the City is confronted

by a growing crime problem that many citizens simply do not know how to resolve.

Mindful of the fact that the parent's right of control is a qualified right and that the [curfew law] furthers several important governmental interests, including those of keeping juveniles from roaming the streets without adult supervision during the nighttime hours and imposing a duty on parents to know the whereabouts and activities of their children at night, it is clear that the [curfew law] fosters in a constitutional manner the welfare of both minors and the general community. The parents' constitutionally protected interest with respect to the upbringing of their children, upon which the [curfew law] infringes only minimally, is outweighed by [Charlottesville's] interest in protecting immature minors and in controlling and preventing nocturnal juvenile mischief and crime. Id. at 1264.

Based on the foregoing analysis, the court concludes that plaintiffs have not raised serious or substantial questions on the merits of their claim that the rights of parents are unconstitutionally infringed by the curfew law. *548

4. FIRST AMENDMENT AND VAGUENESS

a. FIRST AMENDMENT

The curfew law specifically exempts First Amendment activities from its reach. It provides that if minors are engaged in First Amendment activities, "such as free exercise of religion, freedom of speech and the right of assembly," s 17-7(b)(8), they are not subject to the strictures of the curfew law. This same exception is the one upon which the Fifth Circuit placed such heavy reliance in sustaining the Dallas curfew law. In Qutb the Fifth Circuit referred to the First Amendment exception as the "[m]ost notable" aspect of Dallas's curfew law. Another district court, rejecting a First Amendment challenge to a curfew law, found such a claim "without merit" because of a "bona fide [exception for the] exercise of [f]irst [A]mendment rights," an exception in all pertinent respects identical to the one adopted

by Charlottesville. Bykofsky, 401 F.Supp. at 1258. Finally, in Waters v. Barry, 711 F.Supp. 1125 (D.D.C.1989) (Richey, J.), the court struck down a curfew law, that, "[m]ost importantly, ... [it lacked the type of] broad exemption for the exercise of First Amendment rights [contained in the ordinance upheld by Bykofsky]." Id. at 1136 n. 24.

b. VAGUENESS

[13] Plaintiffs argue, however, that the First Amendment exception contained in the curfew law is void for vagueness. [FN13] This argument is unlikely to prevail. [FN14] When statutory language is so vague that people of ordinary intelligence "must guess at its meaning and differ as to its application," the law violates fundamental guarantees of due process, "to wit, providing fair warning and notice of what is prohibited ... so that one may act accordingly." Bykofsky, 401 F.Supp. at 1248 (citing, inter alia, Connally v. General Construction Co., 269 U.S. 385, 389, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926), Coates v. City of Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971)). To give a sense of the doctrine's practical application, the court notes that Bykofsky found the following terms and phrases were not void for vagueness: "reasonable necessity," "[u]pon the Mayor's finding of necessity," "necessary night-time activities," "[n]ormal travel," "best interests of ... minors." Bykofsky, 401 F.Supp. at 1248-53.

FN13. Plaintiffs also invoke the overbreadth doctrine to challenge the curfew law. The overbreadth doctrine is a "device ... [which] evolved in order to permit one properly charged under a statute to raise the First Amendment rights of others, not charged, whose associational or expressive rights might be chilled by enforcement of overly broad legislation." Waters v. Barry, 711 F.Supp. 1125, 1133 (D.D.C.1989). The court agrees with the court in Waters that an overbreadth challenge is not appropriate in this context. The curfew law exempts

activities protected by the First Amendment; hence, if plaintiffs were to take this exemption at its word, they would have no complaint against the curfew law (at least on First Amendment grounds). Plaintiffs' real concern is that the First Amendment exception is too unclear to be relied upon by minors and insufficient to inform enforcement officials of the type of conduct that is protected.

FN14. The court notes that plaintiffs' reliance on CISPES v. FBI, 770 F.2d 468 (5th Cir.1985), is misplaced. The Fifth Circuit in CISPES upheld a statute challenged on First Amendment grounds. In the course of its opinion, the Fifth Circuit noted that an otherwise unconstitutional statute could not be saved by the following provision: "[N]othing contained in this [statute] shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment...." Id. at 474. This clause merely restates a constitutional requirement and a rule of construction; hence, it is distinguishable from the First Amendment exception in the City's curfew law, which absolves any minor of liability for violations of the law provided the minor shows he or she was exercising his or her First Amendment rights. [14] Even if a particular legislative enactment is vague, an individual whose conduct is clearly forbidden or permitted by the enactment cannot proceed on a vagueness challenge; only when a statute is vague as to conduct in which an individual claims to engage may he or she raise a vagueness claim. Parker v. Levy, 417 U.S. 733, 755-56, 94 S.Ct. 2547, 2561-62, 41 L.Ed.2d 439 (1974). Thus, the question the court must ultimately resolve is whether plaintiffs' activities clearly fall within or beyond the scope of the First Amendment.

*549 i. VAGUENESS AND THE FIRST AMENDMENT EXCEPTION

[15] Most of the activities of which plaintiffs claim they are deprived by the ordinance--snacking, swimming, and ice skating

and attending concerts, movies, and parties--clearly do not implicate the First Amendment. As the Supreme Court observed in Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), " 'freedom of speech' means more than simply the right to talk and to write. It is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street or meeting one's friends at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." Id. at 25, 109 S.Ct. at 1595 (holding that meeting at dance halls to socialize is not expressive or intimate association within the meaning of the First Amendment). As plaintiffs emphasize, our First Amendment freedoms are sacred indeed. But it is crucial not to forget, in the rush to assert ones "right," that extending the First Amendment to all activities dilutes the force of the First Amendment and robs us of its most precious gift. Once swimming and drinking soda come within the scope of the First Amendment, by dint of necessity, the First Amendment will mean less and give less; we must carefully guard the First Amendment from becoming sullied by application to claims of this kind.

Even an individual unfamiliar with the Supreme Court's Stanglin opinion could not reasonably believe that swimming, ice skating, drinking soda, or attending a "rave" party falls within the scope of the First Amendment. As to these plaintiffs, therefore, the curfew law's First Amendment exception is not vague. Concededly, plaintiffs also occasionally attend City Counsel meetings during curfew hours and participate in theatrical performances, also past curfew hours. These types of activities, particularly the former, are closer to the kinds of freedoms protected by the First Amendment. But plaintiffs need not rely upon the First Amendment exception to engage in such conduct; the curfew law provides an exception for activities sponsored by public or civic organizations. [FN15]

FN15. The exception requires adult supervision, which the court assumes to be present in theater rehearsals and City Council meetings.

ii. CIVIC ORGANIZATION EXCEPTION

[16] This brings the court to plaintiffs' assault upon the definition "civic," which plaintiffs also decry as unduly vague. Plaintiffs represent that they cannot know whether, for instance, participation in a community theater group qualifies. Although plaintiffs cite a Supreme Court case that found the term to be vague, see Hynes v. Mayor of Borough of Oradell, 425 U.S. 610, 621, 96 S.Ct. 1755, 1761, 48 L.Ed.2d 243 (1976) (Burger, C.J.), it must be recalled that the determination is context-specific.

Moreover, in Hynes the ordinance at issue required "[a]ny person desiring to canvass, solicit or call from house to house ... for a recognized charitable cause ... or political campaign cause ... in writing" to notify the local police department. 425 U.S. at 611, 96 S.Ct. at 1756. Civic organizations were exempted from this requirement. Because the ordinance directly governed speech, the Court held that the statute must meet the "[s]tricter standard [ ] of permissible statutory vagueness [applicable to laws dealing with speech]." Id. at 620, 96 S.Ct. at 1760 (internal quotations and citations omitted). In sharp contrast, the Charlottesville curfew law is a content- neutral time, manner, and place restriction which intrudes only minimally upon First Amendment rights; no rational person could believe that the City of Charlottesville hopes to suppress disfavored viewpoints or otherwise censor expression by asking minors to refrain from roaming our city streets at all hours of the night. Cf. Collins v. Jordan, 102 F.3d 406, 416 (9th Cir.1996) ("Proclaiming a curfew that requires people to remain at home during certain hours is obviously an entirely different matter from prohibiting only specific First Amendment activities during those or other hours.")(citing

United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

*550 The words surrounding the term "civic" in Charlottesville's curfew law, the law's other provisions, and the general thrust of the curfew law cannot be disregarded, for they inform our analysis as to which organizations qualify as civic. In its context, the court believes that the word civic is not unconstitutionally vague as to the conduct in which plaintiffs engage. The curfew law, quite clearly, does not intend to inhibit activities which take place in the presence of an adult for the betterment of children.

Hence, any affiliation with a school, religious organization, or public agency will save an activity scheduled during curfew hours (so long as an adult is present). See s 17-7(b)(5). It is assumed, and reasonably so, that even late at night such activities pose minimal danger to children, and, at the same time, help create well-rounded children. The curfew law aims to draw a line between late-night congregations at bars and gatherings that involve entertainment with more expressive components. Of course, the law cannot do so with the elegance of a mathematical equation unless it excludes otherwise eligible organizations. Hence, instead of drawing a clear, bright line that would have given more certainty-but would have excluded "deserving" activities--the City chose to rely upon terminology that offers more flexibility to children. After providing examples of organizations that qualify--schools, religious organizations, public agencies--the curfew law included within the scope of the permissible activities those sponsored by "like" organizations and civic organizations. Reference to the dictionary reinforces the import of the preceding discussion. Civic is defined, inter alia, as something that "contribut[es] to general welfare and the betterment of life for the citizenry of a community or enhancement of its facilities, [especially activity] devoted to improving ... recreation." Webster's Third New International Dictionary (Unabridged) 412 (1961). Although on

the margins, individuals of ordinary intelligence may differ as to what qualifies under this definition, the term "civic" in the context of the curfew law is sufficiently understandable in the normal case (for instance, participation in theater) so as to survive a constitutional challenge based on vagueness.

iii. EMERGENCY EXCEPTION

Plaintiffs' final claim of vagueness is of little weight. If accepted by a court of law, it would be plainly scary, for most statutes would be invalidated and legislatures would be forced to start authoring encyclopedic laws. Somehow, plaintiffs find vagueness in the term "emergency," defined as a situation "requiring immediate action to safeguard life, limb or property," including "fires, natural disasters, automobile accidents, or other similar circumstances." s 17-7(a). In their memorandum, plaintiffs query, does this include a run to the convenience store for a band-aid? Plaintiffs' Memorandum at 28. The court can only assume plaintiffs are, in this context, being facetious.

Based on the above discussion, the court concludes that plaintiffs' challenge to the curfew law based on vagueness will likely fail.

5. FOURTH AMENDMENT

[17] Although the court in Waters, 711 F.Supp. at 1137-38, invalidated a curfew law applicable to minors, it rejected the same arguments plaintiffs in this case make in connection with their Fourth Amendment claim. The court is persuaded by this portion of the Waters opinion, and, in addressing plaintiffs' Fourth Amendment claim, quotes the insightful reasoning of Judge Richey. The plaintiffs challenge on Fourth Amendment grounds those provisions of the [curfew law] which permit the arrest and detention of juveniles if they are unable to document: (1) that they are properly on the street during the curfew period, or (2) that they are older than [17] years of age. The plaintiffs contend that the [curfew law], by permitting such arrests and detentions, "repeals pro tanto the Fourth Amendment's protection of [juveniles], for ordinarily the police cannot

constitutionally demand, on pain of arrest and detention, that a person whose behavior is in no way suspicious stop and provide identification." The plaintiffs argue that the Act "authorizes massive and utterly groundless seizures of young adults ..." The [c]ourt disagrees. The plaintiffs' argument reflects, in essence, an attempt to find in the *551 Fourth Amendment an absolute right to be free from searches and seizures, a right that cannot be limited by the government's power to criminalize certain forms of behavior. The [c]ourt finds no such absolute right in the Fourth Amendment. Instead, as the very language of the Fourth Amendment provides, a right to be free from such intrusions exists only so long as there is not probable cause to believe that an offense has been committed. Here, the [City] has attempted to criminalize the public presence of juveniles during the curfew hours.... The proscriptions of the [curfew law] ... provide ... valid substantive references for determining the presence or absence of probable cause in a given case.

Although the purported crime is utterly simple--nocturnal, public youth-that simplicity causes the type of proof required to justify a search or seizure to be similarly uncomplex. Thus, were a police officer to reasonably conclude that an individual looked "young"--that he or she looked like a minor--the officer would have "probable cause" to believe that the individual was engaged in an illegal act, i.e., being on the streets during the curfew period. If the individual could not prove that he or she was over [17], or that he or she fell within one of the [curfew law's] other exceptions, the officer would be entitled to place the individual under arrest. So long as the officer could reasonably have believed that the individual looked "young," the search, seizure or arrest would take place on the basis of probable cause and no Fourth Amendment violation would occur. Id. at 1137-38 (footnotes omitted).

With Judge Richey the court concludes that a curfew law, simply because it prohibits unauthorized public presence on the streets by minors does not, on its face, violate the Fourth

Amendment.

6. EQUAL PROTECTION CLAUSE

[18][19] The principle of equal protection demands (with deceptive simplicity) that all persons who are similarly situated be treated alike. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

Plaintiffs contend the curfew law violates the Equal Protection Clause of the Fourteenth Amendment because it distinguishes between individuals below the age of seventeen and individuals of that age and older. Age is not a suspect class, see Gregory v. Ashcroft, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and, consequently, the rational basis test applies. The curfew law meets through this standard, for to uphold the law the court need only find that (1) there is a reasonable basis for distinguishing between individuals under the age of seventeen and those above that age, and (2) the relationship between ends and means is rational. As should be apparent from the court's discussion above, the court believes the curfew law satisfies both criteria.

Minors and adults differ in significant respects, and our laws frequently deny to one group what they give freely to the other. That the line is drawn to exclude seventeen year olds gives the court no pause; the legislature must choose some cut off point, and it is certainly not arbitrary to conclude that seventeen year olds, in the context of a curfew law, are more like adults than like minors. Such inquiry, in any event, is properly left in the legislative realm. Also relegated to elected officials is the question whether the means chosen are the best way to advance their chosen ends, so long as the ends are legitimate, and the means reasonably advance those ends. The ends of the curfew law--to decrease juvenile crime and protect children-clearly and indisputably are legitimate. The means chosen by the City of Charlottesville-- limiting the instances in which minors may roam the streets--reasonably advance the purpose of the curfew

law.

This conclusion puts an end to the court's examination of the curfew law on equal protection grounds.

B. IRREPARABLE INJURY TO PLAINTIFFS, HARM TO DEFENDANT, AND THE PUBLIC INTEREST

Given the court's conclusion that plaintiffs have not raised serious and substantial questions on their claims (and are unlikely to prevail on the merits of their claims), the *552 court need not consider the remaining Blackwelder factors (irreparable injury, harm to defendant, and the public interest), because preliminary injunctive relief is only appropriate when, at the very least, there has been a showing that the merits of the claims raised ultimately have some serious chance of success. Nevertheless, the court will consider these factors, which only reinforce its conclusion that preliminary injunctive relief should not issue.

1. IRREPARABLE INJURY TO PLAINTIFFS

[20][21] The curfew law does not directly regulate speech, but rather is aimed at conduct only. It is a content-neutral time, place, and manner restriction. This point is bolstered by plaintiffs' affidavits, none of which contain any allegation that their rights to free speech are being abridged. That minors cannot attend "rave" parties, ice skate, or drink soda during four or five hours each night cannot qualify as irreparable injury, even if it is a nuisance for a minor to confine such socializing to earlier hours. That the parents of minors cannot permit their children to engage in such activities without their supervision likewise does not qualify as irreparable injury. Accordingly, the court finds that plaintiffs will suffer no irreparable injury if the curfew law is not enjoined from operation.

2. HARM TO DEFENDANT

[22] The City of Charlottesville presented testimonial evidence that it would be harmed if the court were to halt enforcement of the curfew law. Mr. Chapman explained that children and parents in Charlottesville have begun to accept the

curfew law, and a sudden reversal of the law would result in a loss in momentum and would send an undesirable message to children--that roaming the streets at night is not only appropriate, but also a "right." More concretely, a child could suffer bodily injury or inflict such injury on another as a direct result of a suspension of the curfew law. Of course, even one incident of violence suffered by an innocent human being constitutes tremendous harm to that individual and society at large. Therefore, the court finds that defendant would likely be harmed were the court to grant plaintiffs' motion for preliminary injunctive relief.

3. PUBLIC INTEREST

[23] The public interest cuts in favor of the City. Nationally and in the Metro area, the number of juveniles charged with violent crimes, aggravated assaults, gun offenses, rape, sex offenses, larceny, auto theft, and drug- related crimes, is staggering by all accounts; nor do juveniles, who are also victims of such crimes, escape unscathed. See Pierre Thomas & John Fountain, Drug Arrests of Juveniles Rise Sharply; Local, National Trend Contrasts to Decrease in Overall Crime Rate, Wash. Post, Dec. 26, 1996, at A1; Kathryn Wexler, Juvenile Arrests Are on the Rise, Wash. Post, June 20, 1996, at M1; Pierre Thomas, Arrests Soar for Violent Crime by Juveniles, Wash. Post, Sept. 8, 1995, at A1; Eric L. Wee, Violent Crime Continues to Increase Among Youths, Wash. Post, Mar. 30,1995, at V1; Nancy Lewis, Court Cases Reveal Arms Buildup Among D.C. Youths, Wash. Post, Jan. 1, 1995, at A1; Cindy Loose & Pierre Thomas, 'Crisis of Violence' Becoming Menace to Childhood, Wash. Post, Jan. 2, 1994, at A1; DeNeen L. Brown, Sex Offenses by Juveniles Rise in Area, Wash. Post, Mar. 9, 1992, at D1. One would be quixotic to believe that a curfew law alone could reverse these frightening trends or cure the ills that cause them. But it may contribute in some manner, however small, and the judiciary has a responsibility not to tie the hands of our local governments

unless very good cause supports such interference. Moreover, it appears that curfew laws have done some good. See Professor Dan M. Kahan, Curfews Free Juveniles, Wash. Post, Nov. 14, 1996, at A21 (criticizing Hutchins and citing drops in crime in cities that have adopted curfews). Dan M. Kahan, a professor of constitutional and criminal law at the University of Chicago, points out the irony in challenges such as that brought by plaintiffs: apparently, there is evidence that "70 percent of [black] teenagers in the District [of Columbia] support[ ] a nighttime curfew[, and i]nner-city parents-on whose behalf the ACLU often purports to speak when it attacks *553 curfews--are frequently among the strongest supporters of these laws." Id.

Meanwhile, the court has found that the First Amendment and other precious constitutional freedoms guaranteed our citizens are probably not implicated by the curfew law. Aside from all the reasons the court has already listed to support this conclusion, stark reality cannot be ignored. Children under the age of seventeen generally do not wish to escape their homes after midnight to go to church (which the curfew law permits) or to attend a political rally (which the curfew law also permits). [FN16] Instead, plaintiffs likely view as a burden the need to return early from a movie or a social event; the court agrees that the curfew law may be a nuisance, particularly to well-adjusted children who are careful and have no intention of committing crime. But, as Justice Holmes reminded us, most laws prohibit conduct in which men wish to engage. See Adkins v. Children's Hosp., 261 U.S. 525, 568, 43 S.Ct. 394, 405, 67 L.Ed. 785 (1923) (Holmes, J., dissenting) ("But pretty much all law consists in forbidding men to do some things that they want to do...."). If it were otherwise, there would be little need for laws. Yet, for the reasons already discussed, there is a need for the curfew law.

FN16. By no means does the court suggest that First

Amendment protection extends only to political rallies and attendance at church.

All these reasons lead the court to conclude that plaintiffs' request for a preliminary injunction must be denied.

An appropriate Order shall this day issue.

ENTERED: /s/ James H. Michael, Jr.
Judge
April 30, 1997

In The United States District Court,
For the Western District of Virginia
Charlottesville Division.

Daniel SCHLEIFER, et al.,
Plaintiffs,
v. Civil Action No. 97-0021-C.
CITY OF CHARLOTTESVILLE,
Defendant. JUDGE JAMES H. MICHAEL, JR.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that plaintiffs' motion for preliminary injunctive relief shall be, and it hereby it, denied.

The Clerk of the Court is hereby directed to send a certified copy of this Order and accompanying Memorandum Opinion to all counsel of record.

ENTERED:/s/ James H. Michael, Jr.
Judge
April 30, 1997

In The United States District Court,
For the Western District of Virginia
Charlottesville Division.

Daniel SCHLEIFER, et al., Civil Action No. 97-0021-C.
Plaintiffs,
v. MEMORANDUM OPINION
CITY OF CHARLOTTESVILLE,
Defendant.

MICHAEL, District Judge.

On April 30, 1997, this court issued an Order and accompanying Memorandum Opinion in which it denied the request for preliminary injunctive relief made by Plaintiffs Daniel Schleifer, William McCutcheon, Nora Lally- Graves, Lisa Briggs, Anne Briggs, Jill Landers Jaquith, Harry James Landers, and Waldo David Landers Jaquith. The court held that the curfew law enacted by Defendant City of Charlottesville was likely to survive constitutional muster and that the factors set out in Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189, 196 (4th Cir.1977), counseled against the issuance of preliminary injunctive relief.

On May 13, 1997, the court held a hearing on the merits of plaintiffs' claims and is now prepared to render a final decision in the case. Because the court has extensively set out its view of the governing law and relevant facts in this case in its previous Memorandum Opinion, this Memorandum Opinion should be read in tandem with the court's prior Memorandum Opinion. The court will, as best it can, attempt to avoid repeating itself. For the reasons stated in the court's April 30, 1997 Memorandum Opinion and for the reasons set out below, the court holds that plaintiffs' request for permanent injunctive relief must be denied, because the curfew law does not violate the United States Constitution.

I. STANDARD OF REVIEW

At the hearing on the merits, there appeared to be some

question as to the standard of review applicable to their constitutional attack upon the curfew law, although plaintiffs' counsel, Mary Bauer, stated that plaintiffs still took the position that strict scrutiny review applied: The court clearly set out the governing standard in its April 30, 1997 Memorandum Opinion. The court reiterates that a law which implicates a fundamental right guaranteed by the Constitution normally is subject to strict scrutiny review; insofar as the curfew law affects the rights of minors, and not adults, the curfew law need not hazard the rigors of strict scrutiny review. [FN1] The more lenient standard of *825 review that applies, however, is not the rational basis test (except insofar as plaintiffs challenge the law under the Equal Protection Clause solely because it distinguishes between individuals based on their age). Instead, to pass constitutional muster, the curfew law must be necessary to achieve a significant governmental interest, and there must be a substantial fit between means chosen by the curfew law (restricting certain activities of children under age seventeen during late-night and early-morning hours) and ends (protecting juveniles and reducing juvenile crime). This standard, in terms of stringency of review, falls somewhere in between strict scrutiny and the rational basis test.

FN1. During her closing argument, counsel for plaintiffs suggested that the City of Charlottesville had failed to present any evidence to support the conclusion that the three factors articulated in Bellotti v. Baird, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979), should apply in this case; specifically plaintiffs' counsel maintained that the City put forward no proof that (1) the decision by a child to roam the street at night might be a critical choice, and (2) parents may welcome the curfew law as a tool to reinforce their authority. Assuming such evidence is necessary, plaintiffs' counsel is incorrect. For instance, there is evidence in the record demonstrating that (1) some children roam the street on a regular basis and, as a

consequence, perform poorly at school, and (2) parents' efforts to keep their children off the street are reinforced by the curfew law. The City offered affidavits from a school principal and a counselor who indicated that children's academic performance is suffering because they stay out late at night (during which time it can be inferred that the children are not engaged in their studies). John J. Gaines, III, a long-time City resident, and Alicia B. Lugo, also a City resident and the executive director for an organization that works with teenagers, attested that, increasingly, young children aggregate outside after midnight, shouting and making a general disturbance. Finally, the City's Chief of Police and the City's Commonwealth Attorney, cited parental efforts to secure their children's presence at home and the value of the curfew law in achieving this goal. Despite the court's conclusion that the curfew law need not pass strict scrutiny review, the court nonetheless, in its April 30, 1997 Memorandum Opinion, analyzed the curfew law under strict scrutiny review (again, except, of course, as to plaintiffs' challenge under the Equal Protection Clause). In this Memorandum Opinion, the court does the same; the court does so because the court believes the curfew law can survive even strict scrutiny, and, therefore, a fortiori must survive any lesser standard of review. To reiterate, the court holds that strict scrutiny review does not govern the curfew law, but assumes to the contrary for the purposes of this Memorandum Opinion and analyzes the curfew law as though strict scrutiny review applied.

II. FREEDOM OF MOVEMENT

[1] As the court stated in its prior Memorandum Opinion, the court accepts plaintiffs' contentions that freedom of movement is a fundamental constitutional right and that the curfew law impinges upon minors' rights to free movement. The court concluded in its prior Memorandum Opinion, however, that the state interests in enacting the curfew law--protecting juveniles and reducing juvenile crime--were compelling. The court also found that the law likely employed the least restrictive means

possible--only a few hours each night were burdened, and the curfew law offered many escape hatches through its list of exceptions. The hearing on the merits has not undermined the court's tentative finding, and the court now holds that the curfew law passes the least restrictive means test for the reasons discussed more extensively in its prior Memorandum Opinion. In deciding (at the preliminary injunction stage) that the evidentiary nexus between means and ends was probably sufficient to satisfy the narrowly-tailored requirement, the court relied upon the following evidence: the affidavit of the City's Police Chief, the affidavits of other police officers who work in Charlottesville; the testimony of the City's Commonwealth Attorney, who explained that most serious crimes occur at night and that juvenile crime was on the rise in Charlottesville; the affidavits of educators, including a high school principal and a counselor; the affidavits of City residents; the affidavit and testimony of an expert on curfews, who provided national and state statistics on crime, which showed an alarming increase in juvenile crime, nationally and locally; and statistics from Charlottesville's local court demonstrating an increase in juvenile delinquency cases.

During the hearing on the merits, the City offered additional evidence: it submitted police reports from 1996 and 1997 comparing the incidents of drunk driving, aggravated assault, robbery, and forcible rape during curfew hours and during noncurfew hours.

[FN2] A summary chart revealed that as to all *826 offenses, the rate of offenses committed per hour was (substantially) greater during curfew hours. Two police officers, both of them with years of experience in law enforcement, also testified at the hearing on behalf of the curfew law. One of them, determined by the court to be an expert in the area of law enforcement, testified that juveniles faced more dangers during curfew hours than during the day, particularly from drug trafficking. He opined that the curfew law would save some children. Finally,

the City (and plaintiffs) offered into evidence information considered by the City of Charlottesville in deciding to adopt the curfew; these exhibits included, inter alia, the community response to the curfew law, a poll of community members, numerous articles on curfew laws, data on (juvenile) crime incidence, and outlines of other cities' experience with curfew laws. The exhibits reveal considerable and careful deliberation and extensive research by the City and the proponents of the curfew law.

FN2. These incident reports were not broken down according to age of the perpetrators; nonetheless, the court finds the statistics useful.

The copious evidence presented at the hearing on the merits, along with the evidence previously submitted by the City, establishes a strong evidentiary nexus between the means chosen by the City and the articulated governmental interest. The City has demonstrated a troubling (juvenile) crime problem that appears to be on the rise, to which juveniles also fall victim. Plaintiffs' rejoinder to the City's evidence, as discussed in the court's prior Memorandum Opinion, is to criticize the lingering uncertainty that, of necessity, must accompany passage of the curfew law. Of course it cannot be conclusively demonstrated that the curfew law will be effective; all too many variables factor into the equation. Nor can it be said that the curfew law is perfectly tailored to its goal; for instance, the inclusion of seventeen year olds might have made for a better fit between the classification and the governmental interest. But, even under strict scrutiny review, the law does not demand the perfection of a scientific equation from local governments. Demonstrating any proposition with absolute certainty in many cases may be an impossibility, considering all the factors which must be brought into the matrix before the legislative body and on which factors that body must rely in reaching conclusions. Thus, as the

Supreme Court has made clear, the Constitution does not impose such a standard. See Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). There is no requirement of perfect tailoring, but only of narrow tailoring; were it otherwise, there would be no need to perform strict scrutiny analysis, for strict scrutiny would be "strict only in theory but fatal in fact," see Gerald Gunther, The Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L.Rev. 1, 8 (1972).

The only additional evidence plaintiffs submitted at the hearing on the merits to challenge the evidentiary nexus between the means employed by the curfew law and its ends is ultimately unpersuasive. For instance, the telephonic deposition by plaintiffs' expert, Dr. Jeffery Alan Butts, reveals that Dr. Butts is unfamiliar with Charlottesville or its crime problem; he knows little of the City's demography or its crime trends. See Dr. Butts Deposition at 42, 50, 62. Moreover, his study focused on cities in South Carolina with curfew laws; his study, purporting to find more crime during the day than at night, did not account for the fact that the curfew laws might have reduced the level of night-time crime. Indeed, Dr. Butts even conceded this possibility. Id. at 57-58. Another reason Dr. Butts's analysis is problematic rests with the inclusion of simple assault--a crime of relatively less seriousness--in his calculations of crime rate. Id. at 59. It is interesting and telling that no law enforcement officials (those with first-hand knowledge of crime) testified in support of Dr. Butts's conclusions; plaintiffs did offer the testimony of a retired police officer, but, while he explained that he was not a champion of Charlottesville's curfew law, he stated that, as a police officer, he would have had no objection to it. The police officer offered two reasons for his position. First, he explained that he was concerned that the police department lacked the resources to enforce the curfew law; specifically, he feared that the police department would

have no facility to place children who violated curfew. The second reason for the police officer's lack of *827 enthusiasm was, ironically, that he worried that the curfew law would be tied up with legal challenges. Even if Dr. Butts's conclusions were free from such problems, the court would be loath to accept the testimony of one expert (with whom some experts agree and others disagree) to invalidate a law supported by careful deliberations of a legislative body with an immediate stake in and familiarity with its community, when that legislative body has thoroughly considered substantial evidence relating to curfews and has credited one view over the other. There is no basis for this court to credit Dr. Butts's expert over that of the City's expert; that, quintessentially, is the legislature's job. Under strict scrutiny review, the City must show that there exists an evidentiary nexus between ends and means; but in so doing, it cannot be expected conclusively to rebut all other opinions.

Plaintiffs' exhibits reveal that plaintiffs' counsel, Mary Bauer, and some of the plaintiffs in this case (Mr. Daniel Schleifer and Mr. Waldo Jaquith, for instance), were present during public hearings on the curfew law and expressed their opposition to the law. They lost the legislative battle, and now they come to the court, asking it to reverse their loss. [FN3] The court declines to do so, because the law survives even strict scrutiny review; the court holds the curfew law is narrowly tailored to a compelling governmental interest.

FN3. In its prior Memorandum Opinion, in the course of reflecting upon the public interest at stake in the curfew law, the court noted that there was evidence indicating that the black community in Washington, D.C. supported a curfew law similar to the one enacted by Charlottesville (the District's curfew law, as discussed in the court's previous Memorandum Opinion, was recently struck down by a federal court). Apparently in response to the court's observation, plaintiffs' counsel offered

the testimony of two black citizens in Charlottesville's community, both of whom expressed opposition to the curfew law. The court credits their testimony as an honest account of their sincerely held beliefs. However, neither of these citizens were experts in sociology; nor had either conducted any surveys or polls upon which they could base their conclusions; their evidence was of an anecdotal nature. Unsurprisingly, as the cross-examination of City's counsel demonstrated, various black leaders in the Charlottesville community support the curfew law (two of whom have submitted affidavits with the court). Second, and more to the point, the opinion of any group of lay citizens as to the desirability of a law cannot decide the constitutionality of that law.

III. PARENTING RIGHTS

[2] In its previous Memorandum Opinion, the court concluded, on the evidence then before it, that the restriction upon parental rights imposed by the curfew law was only minimal (i.e., not of constitutional significance) and that plaintiffs were unlikely to prevail on the merits of this claim.

No evidence presented at the hearing on the merits alters the court's tentative conclusion in its Memorandum Opinion of April 30, 1997. The only parent who testified, Mr. Harry James Landers, reiterated his statement which had been already submitted to the court by affidavit. His position--that regardless whether his child is fifteen, ten, or five years old, he would like to have absolute control over the child's activities--does not comport with Supreme Court precedent, under which the state has an independent interest in the well-being and safety of children, which may at times conflict with parental desires. To give just one example, Mr. Landers could not authorize his daughter (if she were five years old, for instance) to make nightly visits to a bar so she could listen to jazz music if, under state law, entry was to be denied all individuals under the age of eighteen. This is so even if Mr. Landers were completely and

sincerely convinced that nocturnal jazz was essential to the development and cultural enrichment of his five year old.
Based on the reasoning above and the reasoning laid out in far more detail in its prior Memorandum Opinion, the court holds that the curfew law does not infringe upon parental rights to a constitutionally significant degree.

IV. FIRST AMENDMENT AND VAGUENESS

[3] As discussed in the court's April 30, 1997 Memorandum Opinion, the curfew law contains an exemption for juveniles who wish *828 to exercise their First Amendment rights after 12:01 a.m. or 1:00 a.m., as the case may be. Plaintiffs, however, challenge the First Amendment exception and the exception for civic organization on vagueness grounds. The court, in full detail, laid out the governing law and discussed how it applies to this case in its prior Memorandum Opinion. Here, the court will discuss only the issues newly raised at the hearing on the merits. The court will address the vagueness challenge to the exception for the First Amendment and to the civic organization exception together. [FN4]

FN4. The emergency exception, as the court previously explained in unequivocal language, is sufficiently clear to put a person of ordinary intelligence on notice as to what is covered.

On this subject, the remarks of the three minor plaintiffs who testified are illuminating. Mr. Daniel Schleifer, an articulate young sixteen year old, testified that although he certainly disliked the curfew law, the curfew law had no direct effect on him.

Nor did he have any fears of arrest. [FN5] At the hearing on the merits, Mr. Schleifer and his fellow plaintiff, Mr. Waldo Jaquith, asserted that during curfew hours they engaged in political discussions on the downtown mall. The court is somewhat troubled by these sudden assertions, of which no mention was made in Mr. Schleifer's and Mr. Jaquith's affidavits

(filed in support of plaintiffs' motion for preliminary injunctive relief) and which assertions followed the court's April 30, 1997 Memorandum Opinion, in which the court mentioned politics in connection with the First Amendment on a few occasions. In any event, politics and political discourse lie at the very core of the First Amendment, see Paul B. Stephan, The First Amendment and Content Discrimination, 68 Va. L.Rev. 203 (1982), and there can be no reasonable doubt on any citizen's part that the First Amendment covers political debates. Thus, if Messrs. Schleifer and Jaquith believe that the ideal time to discuss politics is in Charlottesville's downtown mall at the strike of midnight (or after 1:00 a.m.), they may do so without violating the curfew law.

FN5. Elaborating, Mr. Schleifer explained that he had no fears of arrest because he was white and speculated that a young black man would be fearful. No black youths, however, testified that they had such concerns.

[4] Like Mr. Schleifer, Mr. Jaquith testified that the curfew had no direct effect on his actions, partly because he is eighteen; the curfew law affected Mr. Jaquith only indirectly, through his friends, some of whom are under seventeen years of age and are consequently constrained by the curfew law. When questioned by his counsel regarding whether all of the activities in which he and his friends engaged were covered by the exceptions in the curfew law, Mr. Jaquith responded that roller blading (after 12:01 a.m. or 1:00 a.m.) would probably be prohibited under the curfew law, unless, he speculated, "an expensive lawyer" could convince a court that it fell within the First Amendment exception. Ironically, plaintiffs' counsel, Mary Bauer, essentially makes this very argument: that activities such as roller blading are indeed covered by the First Amendment, because roller blading encompasses more than just skating--children are engaged in associational activity while they glide. Mr. Jaquith's

comment, supported by the law and the young man's common sense, suggests a realization that the First Amendment to the United States Constitution does not cover roller blading (contrary to his lawyer's efforts to recharacterize roller blading and like activities). Even if, however, Mr. Jaquith believes to the contrary, this is irrelevant, for such a belief would be unreasonable.

[5] Finally, Ms. Lisa Briggs, a precocious young lady of thirteen, made clear her adamant disdain for the curfew law and the impositions it worked upon her social schedule. She also testified that, contrary to the court's prior assumption, when she volunteered at the local theater, an adult was not always present. Thus, Ms. Briggs' theatrical activities would not be covered under the exception for civic organizations. The court previously had avoided addressing the question whether the First Amendment exception was vague as to theater participation (because the court believed theater participation *829 would be covered under the civic organization exception). Squarely confronting this question now, the court holds that the First Amendment exception is not unduly vague as it applies to theater rehearsals. Artistic expression, though further removed from core First Amendment protection than politics, is essential to our "marketplace of ideas;" art provides richness, depth, and texture that would otherwise be absent from our democracy and public life. One need not be steeped in First Amendment jurisprudence to understand this; a reasonably educated person would know that theater productions-- including theater rehearsals--are included within the First Amendment's guarantee of free speech and expression. Cf. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991)(Rehnquist, C.J.) (stating that even theaters in which nude dancing is performed are entitled to some First Amendment protection).

None of the plaintiffs offered examples of any other conduct in which they engaged that does not fall either clearly within or

clearly beyond the First Amendment exception or the exception for civic organizations (the exceptions plaintiffs challenge as vague). Therefore, for the reasons stated in greater detail its previous Memorandum Opinion and for the reasons set out above, the court holds that the curfew law does not infringe plaintiffs' right to the First Amendment and is not void for vagueness.

V. FOURTH AMENDMENT

Plaintiffs informed the court at the hearing that they were abandoning their claim that the curfew law, on its face, violates the Fourth Amendment. As should be clear from the court's discussion of plaintiffs' Fourth Amendment claim in its April 30, 1997 Memorandum Opinion, the court agrees that there is no merit to the claim that the curfew law, on its face, vitiates the requirement of probable cause or reasonableness.

VI. FOURTEENTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE

For the reasons stated in this Memorandum Opinion and the court's previous Memorandum Opinion, the age-based classification used by the curfew law easily survives the rational basis test that applies when neither a suspect class nor a fundamental right is implicated. Therefore, the curfew law cannot be struck down on equal protection grounds.

VII. SUMMARY

The court believes that the curfew law reflects the City's justifiable effort to protect our youth and to reduce an unacceptably high level of crime. The curfew law suffers from no constitutional infirmity. Thus, the court rejects plaintiffs' constitutional attack upon the law.

An appropriate Order shall this day issue.

ENTERED: /s/ James H. Michael, Jr.
Judge
20 May, 1997

In The United States District Court,
For the Western District of Virginia
Charlottesville Division.

Daniel SCHLEIFER, et al., Civil Action No. 97-0021-C.
Plaintiffs,

v. ORDER

CITY OF CHARLOTTESVILLE,
Defendant. JUDGE JAMES H. MICHAEL,JR.

For the reasons stated in the Memorandum Opinion of April 30, 1997, and the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

that plaintiffs' motion for permanent injunctive relief be, and it hereby is, denied. This case shall be, and it hereby is, dismissed and stricken from the docket of the court.

The Clerk of the Court is hereby directed to send a certified copy of this Order and accompanying Memorandum Opinion to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge
20 May, 1997

UNITED STATES COURT OF APPEALS
For the Fourth Circuit
No. 97-1723

DANIEL SCHLEIFER, a minor by Barry Schleifer, his father; WILLIAM MCCUTCHEON, a minor by M. Parthenia Monagan, his mother; LISA BRIGGS, a minor by Anne Briggs, her mother; NORA LALLY-GRAVES, a minor by Mary Ann Lally-Graves, her mother; JILL LANDERS JACQUITH, a minor by Harry James Landers, her father; ANNE BRIGGS; HARRY JAMES LANDERS; WALDO DAVID LANDERS JAQUITH,
Plaintiffs-Appellants,

v.

CITY OF CHARLOTTESVILLE,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., Senior District Judge. (CA-97-21-C)

Argued: May 5, 1998

Decided: October 20, 1998

Before WILKINSON, Chief Judge, and ERVIN and

MICHAEL, Circuit Judges.

Affirmed by published opinion. Chief Judge Wilkinson wrote the majority opinion, in which Judge Ervin joined. Judge Michael wrote a dissenting opinion.

COUNSEL

ARGUED: Mary Catherine Bauer, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, Richmond, Virginia, for Appellants. Lisa Robertson Kelley, OFFICE OF THE CITY ATTORNEY, Charlottesville, Virginia, for Appellee. **ON BRIEF:** Deborah C. Wyatt, WYATT & CARTER, Charlottesville, Virginia, for Appellants. W. Clyde Gouldman, II, OFFICE OF THE CITY ATTORNEY, Charlottesville, Virginia, for Appellee.

OPINION

WILKINSON, Chief Judge:

This appeal involves a challenge to the constitutionality of a juvenile nocturnal curfew ordinance enacted by the City of Charlottesville. The district court held that the ordinance did not violate the constitutional rights of minors, their parents, or other

affected parties and declined to enjoin its enforcement. We agree that the ordinance is constitutional and affirm the judgment of the district court.

I.

On December 16, 1996, the Charlottesville City Council, after several months of study and deliberation, amended Section 17-7 of the City Code to enact a new juvenile nocturnal curfew ordinance. The City Council designed the curfew ordinance to:

> (i) promote the general welfare and protect the general public through the reduction of juvenile violence and crime within the City; **(2)**
>
> (ii) promote the safety and well-being of the City's youngest citizens, persons under the age of seventeen (17), whose inexperience renders them particularly vulnerable to becoming participants in unlawful activities, particularly unlawful drug activities, and to being victimized by older perpetrators of crime; and
>
> (iii) foster and strengthen parental responsibility for children.

Charlottesville, Va., Code § 17-7, Intro.

Effective March 1, 1997, the ordinance generally prohibits minors, defined as unemancipated persons under seventeen, from remaining in any public place, motor vehicle, or establishment within city limits during curfew hours. The curfew takes effect at 12:01 a.m. on Monday through Friday, at 1:00 a.m. on Saturday and Sunday, and lifts at 5:00 a.m. each morning.

The ordinance does not restrict minors' activities that fall under one of its eight enumerated exceptions. Minors may participate in any activity during curfew hours if they are accompanied by a parent; they may run errands at a parent's direction provided that they possess a signed note. The ordinance allows minors to undertake employment, or attend supervised activities sponsored by school, civic, religious, or other public organizations. The ordinance exempts minors who are engaged in interstate travel, are on the sidewalk abutting their parents' residence, or are involved in an emergency. Finally, the ordinance does not affect minors who are "exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly." Id. § 17-7(b)(8).

The ordinance sets forth a scheme of warnings and penalties for minors who violate it. For a first violation, a minor receives a verbal warning, followed by a written warning to the minor and the minor's parents. For subsequent violations, the minor is charged with a Class 4 misdemeanor. The ordinance also makes it unlawful for certain other individuals, including parents, knowingly to encourage a minor **(3)**to violate the ordinance. The full text of the ordinance is included as an appendix to the opinion.

Plaintiffs are five minors under age seventeen who are subject to the ordinance, one eighteen-year-old, and two parents of minor children. The minors allege that, with their parents' permission, they occasionally wish to engage in lawful activities which the curfew will not permit. These activities include attending late movies; getting a "bite to eat"; playing in a band; socializing with older siblings; and attending concerts in Richmond, which would bring them back through Charlottesville during curfew hours. The eighteen-year-old plaintiff alleges that he has been deprived of opportunities to

associate with his younger friends by the ordinance. The parent plaintiffs allege that the ordinance interferes with their decisions on which activities, at what times, are appropriate for their children.

Plaintiffs brought this action for declaratory and injunctive relief, alleging that the ordinance violates their rights under the First, Fourth, Fifth and Fourteenth Amendments. At trial, plaintiffs dismissed their Fourth Amendment claims. Following trial, by order dated May 20, 1997, the district court rejected plaintiffs' remaining claims and denied their motion for a permanent injunction. Plaintiffs now appeal.

II.

Initially we must consider the level of scrutiny appropriate to this case. Plaintiffs contend that the ordinance infringes minors' constitutional liberties and therefore should be subject to strict scrutiny. It is true that "[a] child, merely on account of his minority, is not beyond the protection of the Constitution." Bellotti v. Baird, 443 U.S. 622, 633 (1979) (plurality opinion) (Bellotti II). Minors enjoy some rights under the First and Fourteenth Amendments before they attain adulthood. See, e.g., Planned Parenthood of Cent. Missouri v. Danforth, 428 U.S. 52, 74 (1976); Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969). At the same time, the Supreme Court has made abundantly clear that children's rights are not coextensive with those of adults. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986); Bellotti II, 443 U.S. at 634; Ginsberg v. New York, 390 U.S. 629, 638 (1968); Prince v. Massachusetts, 321 U.S. 158, 168 (1944). "Traditionally at common law, and still today,(4) unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come and go at will." Vernonia

Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

In recognition of these customary limitations, "[t]he state's authority over children's activities is broader than over like actions of adults." Prince, 321 U.S. at 168. State laws do not permit children to drive a car before they reach a certain age. E.g., Va. Code Ann. § 46.2-334. Compulsory attendance laws require children to attend school. E.g., id. § 22.1-254; see also Prince, 321 U.S. at 166. Labor laws limit the opportunities of children to engage in gainful employment. E.g., Va. Code Ann. § 40.1-78; see also Prince, 321 U.S. at 166. These types of laws reflect the state's "general interest in youth's well being." Id.; see also City of Dallas v. Stanglin, 490 U.S. 19, 27 & n.4 (1989); Bykofsky v. Borough of Middletown, 401 F. Supp. 1242, 1256-57 (M.D. Pa. 1975), aff'd mem., 535 F.2d 1245 (3d Cir. 1976).

In light of the case law, two things seem clear. First, children do possess at least qualified rights, so an ordinance which restricts their liberty to the extent that this one does should be subject to more than rational basis review. Second, because children do not possess the same rights as adults, the ordinance should be subject to less than the strictest level of scrutiny. See Carey v. Population Servs. Int'l, 431 U.S. 678, 693 n.15 (1977) (plurality opinion) (when minors are involved the level of scrutiny "is apparently less rigorous than the compelling state interest' test applied to restrictions on the privacy rights of adults"); Danforth, 428 U.S. at 75. We thus believe intermediate scrutiny to be the most appropriate level of review and must determine whether the ordinance is "substantially related" to "important" governmental interests. See United States v. Virginia, 518 U.S. 515, 533 (1996) (quoting Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980)). We also conclude, however, that the ordinance survives constitutional attack under

either a substantial or a compelling state interest standard. The narrow means chosen by the City in the ordinance serve strong and indeed compelling public needs. **(5)**

III.

A.

The text of the Charlottesville curfew ordinance identifies three legislative purposes: (1) to reduce juvenile violence and crime within the city; (2) to protect juveniles themselves from being swept up in unlawful drug activities and from becoming prey to older perpetrators of crime; and (3) to strengthen parental responsibility for children. These enumerated purposes represent important and compelling governmental interests.

In Schall v. Martin the Supreme Court recognized that "[t]he 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted." 467 U.S. 253, 264 (1984) (quoting DeVeau v. Braisted, 363 U.S. 144, 155 (1960)). Indeed it constitutes "a weighty social objective." Brown v. Texas, 443 U.S. 47, 52 (1979). If government cannot ensure the safety of its citizens, it has failed them in the most fundamental sense. Schall further confirms that "this interest persists undiluted in the juvenile context," as the social costs of crime are high no matter what the age of the perpetrator. 467 U.S. at 264-65.

The City contends that its curfew ordinance was passed to combat the marked growth in the rate of juvenile crime both nationwide and within Virginia. During the preliminary injunction hearing Dr. William Ruefle, a criminologist expert in juvenile curfews, testified that these state and national growth trends were reflected in Charlottesville. In fact, the City produced evidence of a twenty-five percent increase in the delinquency caseload of Charlottesville's Juvenile and Domestic Relations Court between 1991 and 1996. Given the

projected increase in the nation's juvenile population between 1995 and 2005, the problem of juvenile crime was unlikely to abate.

In addition, the City has documented two troubling features of the juvenile crime phenomenon. First, the City's evidence on nationwide trends indicated a high rate of recidivism among juveniles and a correlation between juvenile delinquency and adult criminal activity. Thus reducing juvenile crime was a pressing first step in reducing the overall impact of crime on the community. Second, Charlottesville's (6) City Council was concerned about the marked increase in the violence associated with juvenile crime. As the City's expert Dr. Ruefle stated in an affidavit submitted to the district court,"[j]uveniles in Virginia now commit serious property crimes at twice the rate of those 18 years of age and older, and since 1990, they also commit serious violent crimes at a higher rate than adults." In light of this evidence, Charlottesville's first stated purpose is undeniably compelling. Likewise, the City's strong interest in fostering the welfare of children and protecting the youngest members of society from harm is well-established. See, e.g., Santosky v. Kramer, 455 U.S. 745, 766 (1982); Ginsberg, 390 U.S. at 640; Prince, 321 U.S. at 166-67. Courts have recognized "the peculiar vulnerability of children," Bellotti II, 443 U.S. at 634, and the Supreme Court long ago observed that "streets afford dangers for [children] not affecting adults." Prince, 321 U.S. at 169. Those dangers have not disappeared; they simply have assumed a different and more insidious form today. Each unsuspecting child risks becoming another victim of the assaults, violent crimes, and drug wars that plague America's cities. Given the realities of urban life, it is not surprising that courts have acknowledged the special vulnerability of children to the dangers of the streets. Nunez v. San Diego, 114 F.3d 935, 947 (9th Cir. 1997); In Re Appeal in Maricopa County, Juvenile Action No. JT9065297, 887 P.2d 599, 606 (Ariz. Ct.

App. 1994) (Maricopa County); In Re J.M., 768 P.2d 219, 223 (Colo. 1989) (en banc); see also Bykofsky, 401 F. Supp. at 1257. Charlottesville, unfortunately, has not escaped these troubling realities. Two experienced City police officers confirmed to the district court that the children they observe on the streets after midnight are at special risk of harm.

Charlottesville's third purpose -- strengthening parental responsibility for children -- is also a significant interest. The City shares with parents and guardians a responsibility to protect children. Prince, 321 U.S. at 165-66; Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). State authority complements parental supervision, and "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors." Bellotti II, 443 U.S. at 637. The Supreme Court has acknowledged "the special interest of the State" in encouraging minors to seek parental advice in making important decisions. Id. at 639. And the Court has confirmed that the (7) state is appropriately concerned with the integrity of the family unit. Trimble v. Gordon, 430 U.S. 762, 769 (1977). Therefore, like the City's two preceding interests in reducing the incidence of juvenile crime and juvenile victimization, the City's third aim constitutes an important governmental purpose.

B.

Conceding for the sake of argument that the curfew's stated ends are sufficiently compelling, plaintiffs train their attack on the means by which the ordinance seeks to achieve its goals.

We agree with plaintiffs that the curfew must be shown to be a meaningful step towards solving a real, not fanciful problem. As the Supreme Court has said in the First Amendment context, the government "must do more than simply `posit the existence of the disease sought to be cured.' It must demonstrate that the

recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." Turner Broad. Sys., Inc.v. FCC, 512 U.S. 622, 664 (1994) (citations omitted). This standard, however, has never required scientific or statistical "proof" of the wisdom of the legislature's chosen course. Cf. Ginsberg, 390 U.S. at 642-43 ("We do not demand of legislatures `scientifically certain criteria of legislation.'") (quoting Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911)). The Supreme Court has recognized that"[i]t is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique. But this merely illustrates that proving broad sociological propositions by statistics is a dubious business." Craig v. Boren, 429 U.S. 190, 204 (1976). This uncertain nature of remedial legislation is no reason for courts to fashion their own cures or to scuttle those the legislature has provided. In fact, "[f]ederal courts have always been reluctant to question the potential effectiveness of legislative remedies designed to address societal problems." Qutb v. Strauss, 11 F.3d 488, 493 n.7 (5th Cir. 1993).

Charlottesville was constitutionally justified in believing that its curfew would materially assist its first stated interest -- that of reducing juvenile violence and crime. The City Council acted on the basis of information from many sources, including records from Charlottes-**(8)** ville's police department, a survey of public opinion, news reports, data from the United States Department of Justice, national crime reports, and police reports from other localities. On the basis of such evidence, elected bodies are entitled to conclude that keeping unsupervised juveniles off the streets late at night will make for a safer community. The same streets may have a more volatile and less wholesome character at night than during the day. Alone on the streets at night children face a series of dangerous and potentially life-shaping decisions. Drug dealers may lure them to use narcotics or aid

in their sale. Gangs may pressure them into membership or participation in violence. "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." Bellotti II, 443 U.S. at 635; see also Nunez, 114 F.3d at 947; Maricopa County, 887 P.2d at 606-07; In Re J.M., 768 P.2d at 223. Those who succumb to these criminal influences at an early age may persist in their criminal conduct as adults. Whether we as judges subscribe to these theories is beside the point. Those elected officials with their finger on the pulse of their home community clearly did. In attempting to reduce through its curfew the opportunities for children to come into contact with criminal influences, the City was directly advancing its first objective of reducing juvenile violence and crime.

Plaintiffs contend that the exclusion of seventeen-year-olds from the curfew is a fatal flaw in the ordinance. They argue that this group is responsible for one-third of all crimes committed by juveniles nationwide and that excluding seventeen-year-olds from the curfew thus renders the ordinance impermissibly underinclusive. However, the City's evidence documents a serious problem of crime among younger juveniles. In Charlottesville in 1995 eighty percent of juvenile arrests for the most serious crimes were of children aged ten to sixteen, and in 1996 eighty-five percent of such crimes were committed by this group. Furthermore, the City's decision to exclude seventeen-year-olds from coverage under the curfew is a legislative judgment that we are loath to second-guess. "[I]t is not the function of a court `to hypothesize independently on the desirability or feasibility of any possible alternative[s]' to the statutory scheme.. .. .. .`These matters of practical judgment and empirical calculation are for [the State].'" Lalli v. Lalli, 439 U.S. 259, 274 (1978) (quoting **(9)** Matthews v. Lucas, 427 U.S. 495, 515 (1976)) (alterations in original). In exercising its legislative

judgment, the City was forced to balance the law enforcement benefit of subjecting seventeen-year-olds to the curfew against the greater law enforcement burden of doing so. Weighing benefits and burdens is what legislatures are about.

Plaintiffs also dispute the effectiveness of the curfew in reducing juvenile crime. They say that the real problem of juvenile crime is not at night, but in the after school hours. Plaintiffs make much of a report entitled Juvenile Offenders and Victims: 1996 Update on Violence, Office of Juvenile Justice and Delinquency Prevention, U.S.Dep't of Justice 27 (1996), which asserts that only seventeen percent of violent juvenile crime occurs during typical curfew hours, while twenty-two percent happens between 2:00 p.m. and 6:00 p.m. on school days. The City responds that the lower rate of late-night crime may reflect the fact that several of the South Carolina cities in the study actually had late-night curfews in effect. And with respect to conditions in Charlottesville before the curfew, City police officers and Charlottesville's Commonwealth's Attorney confirmed that the most serious crimes committed by juveniles occurred during curfew hours. Further, the City Council considered evidence that juvenile offenses occurring in Charlottesville between 11:00 p.m. and 6:00 a.m. increased by thirty-eight percent during 1995 and a further ten percent during 1996. Thus the City had reason to believe that, in both volume and severity, nighttime juvenile crime was a serious, growing problem in Charlottesville.

Charlottesville's City Council concluded that a nighttime curfew might help curb this rising trend of juvenile crime. In making this decision, the City relied on the experience of cities like Lexington, Kentucky, where eight months of enforcing a nighttime juvenile curfew effected an almost ten percent decrease in juvenile arrests for the serious crimes of homicide, assault, robbery, rape, burglary, larceny, auto theft and arson. And the district court heard testimony that a curfew has the

greatest chance of reducing juvenile crime in a smaller city like Charlottesville, where juvenile crime, though a serious problem, has not yet become totally uncontrollable. Fundamentally, however, this dispute about the desirability or ultimate efficacy of a curfew is a political debate, not a judicial one. If local communities conclude that curfews are ineffective in reducing crime, too onerous (10) to enforce, or too intrusive on the liberties of minors, then they are free to discontinue them. Yet local legislative bodies are entitled to draw their conclusions in light of experience with a curfew's operation, and not have their efforts at reducing juvenile violence shut down by a court before they even have a chance to make a difference.

Plaintiffs also dispute that the curfew will contribute much, if anything, to protecting juveniles from crime, the City's second objective. They deny that the streets are a particularly dangerous place for children at night, contending that the majority of crimes committed against children are committed by family members or acquaintances rather than by strangers on the street. The fact that children may be at risk at home or during the day means only that the curfew will not, unfortunately, protect juveniles from all crime. It does nothing to undermine the City's evidence that children remain at risk of crime in the street -- in fact, the City points out that in 1991 thirty-three percent of the violent crimes reported by juvenile victims nationwide occurred on the street. Juvenile Offenders & Victims: A National Report, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice 22 (1995). The Constitution certainly does not put legislatures to the choice of solving the entirety of a social problem or no part of it at all. Plyler v. Doe, 457 U.S. 202, 216 (1982).

Further, the evidence presented by the City identified several special dangers of the nighttime hours: a vigorous street-level drug trade that flourishes during the late evening and early

morning hours and that routinely uses children to facilitate drug transactions, thereby exposing them to a high degree of danger; the difficulties of apprehending perpetrators of crime at night, as criminal activity is less visible and less subject to monitoring by concerned neighbors and passers-by; and the increased degree of violence and seriousness of the crimes that are committed at night. The record documents that in Charlottesville in 1996 aggravated assaults were almost one and one-half times as likely to occur during curfew hours as non-curfew hours, robberies more than twice as likely to occur at these times, forcible rapes more than three times as likely during curfew hours, and incidents of drunk driving more than five times more likely to occur during curfew hours, trends that continued into the first months of 1997. By keeping children off the streets a few hours each night, the curfew **(11)**reduces the exposure of children to these well-known, and well-documented harms.

Finally, plaintiffs dispute the City's claim that the curfew will support the parental role in child-rearing, its third stated goal. They focus exclusively on the testimony of the parent plaintiffs, who clearly do not appreciate the curfew and do not welcome it as an enhancement of their authority. The City was entitled to believe, however, that a nocturnal curfew would promote parental involvement in a child's upbringing. A curfew aids the efforts of parents who desire to protect their children from the perils of the street but are unable to control the nocturnal behavior of those children. And a curfew encourages parents who ignore their children's nighttime activities to take a more active role in their children's lives. See Bykofsky, 401 F. Supp. at 1255; In Re J.M., 768 P.2d at 223. Finally, the curfew assists the efforts of parents who prefer their children to spend time on their studies rather than on the streets. City law enforcement officers related anecdotal evidence that some parents actively welcome the support of the authorities in establishing baselines

for their children and in enforcing reasonable limits on the freedom of their children to wander the streets in the middle of the night. And the City Council acted on the basis of surveys and testimony at public hearings reflecting widespread approval of the curfew and the support it offers to parents' efforts to discipline their children.

C.

The Charlottesville curfew is not only "substantially related" to its stated purposes. The limited scope of the curfew and its numerous exceptions would satisfy even the strict scrutiny requirement of narrow tailoring. See Bernal v. Fainter, 467 U.S. 216, 219 (1984) (narrow tailoring requires that the government use the least restrictive means to advance its goals). Plaintiffs urge, however, that we follow the lead of the Ninth Circuit, which held that San Diego's curfew ordinance failed strict scrutiny review because the exceptions to the ordinance were not sufficiently detailed and comprehensive to make the curfew the least restrictive means of serving San Diego's compelling ends. Nunez, 114 F.3d at 948-49.

The San Diego curfew applied to all minors under the age of eighteen, began at 10:00 p.m., and extended until "daylight immediately **(12)** following." Id. at 938. It contained four exceptions: (1) when a minor is accompanied by a parent or other qualified adult; (2) when a minor is on an emergency errand for his parent; (3) when a minor is returning from a school-sponsored activity; and (4) when a minor is engaged in employment. See San Diego, Cal., Municipal Code Art. 8, § 58.01, quoted in Nunez, 114 F.3d at 938-39.

By contrast, Charlottesville's curfew applies only to minors less than seventeen years of age, does not begin until midnight on weekdays and 1:00 a.m. on weekends, lifts at 5:00 a.m. each

morning, and contains no fewer than eight detailed exceptions. Under Charlottesville's curfew, minors are allowed, inter alia, to remain on the sidewalk directly abutting their residences; to attend supervised activities sponsored by school, religious, public, civic or other similar organizations; to run errands for their parents; to undertake interstate travel; and to engage freely in any activity protected by the First Amendment.

The Charlottesville ordinance carefully mirrors the Dallas curfew ordinance that the Fifth Circuit found to satisfy strict scrutiny in Qutb, 11 F.3d at 490. Like the Charlottesville ordinance, the Dallas curfew covered fewer hours than San Diego's and affected minors under the age of seventeen, not eighteen. In addition to exceptions for employment and emergencies and when a minor is in the presence of a parent or guardian, the curfew at issue in Qutb included a broad exception for sponsored activities, a First Amendment exception, an exception for being outside on the sidewalk adjacent to the minor's home, and an exception for interstate travel. Id. Charlottesville's curfew is in fact even narrower in scope than the Dallas ordinance, as it affects fewer hours each night -- the Dallas curfew extended from 11:00 p.m. until 6:00 a.m. on weeknights and from 12:00 midnight to 6:00 a.m. on weekends, one hour more each day than the Charlottesville ordinance. This curfew, with its narrow scope and comprehensive list of exceptions, represents the least restrictive means to advance Charlottesville's compelling interests. Thus, it would survive even strict scrutiny if that were the appropriate standard of review.

IV.

We next address plaintiffs' claims that the Charlottesville ordinance violates the constitutional rights of parents. Plaintiffs assert that **(13)** parents have a constitutionally protected right

to direct their children's upbringing without undue government interference. They urge that this right includes decisions whether to allow their children to engage in activities after the curfew takes effect. The ordinance interferes with this right, they conclude, by prohibiting children's activities that have the parents' full approval but do not fall under one of the ordinance's eight exceptions.

Not every state restriction of a child's freedom derivatively abridges the fundamental rights of parents. The Supreme Court has rejected the view that parents possess an unqualified right to raise children that trumps any government regulation of their children's conduct. In Prince, the Court recognized"that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare." 321 U.S. at 167; see also Jehovah's Witnesses in Wash. v. King County Hosp. Unit No. 1 (Harbor-View), 390 U.S. 598 (1968) (per curiam), aff'g 278 F. Supp. 488 (W.D. Wash. 1967); Bykofsky, 401 F. Supp. at 1262. Furthermore, were we to accept plaintiffs' argument, future litigants could simply artfully plead violations of parental rights to avoid the Supreme Court's determination that children do not possess all the freedoms of adults. Arguments based on minors' rights to engage in particular conduct would be routinely recast as arguments based on parents' rights to allow their children to engage in precisely the same conduct.

We are mindful that the Supreme Court has suggested in other contexts that parents may possess a fundamental right against undue, adverse interference by the state. See Wisconsin v. Yoder, 406 U.S. 205, 231 (1972) (state compulsory high school attendance law interfered with "traditional concepts of parental control over the religious upbringing and education of their minor children"); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (state presumption that unmarried father was unfit parent undermined "the interest of a parent in the companionship, care,

custody, and management" of child); Meyer v.Nebraska, 262 U.S. 390, 400 (1923) (state prohibition against teaching of foreign languages frustrated "the natural duty of the parent to give his children education suitable to their station in life"). We do not believe, however, that cases involving a parent's custodial rights or authority to direct a child's education support plaintiffs' claim. The Charlottesville ordinance, prohibiting young children from remaining **(14)** unaccompanied on the streets late at night, simply does not implicate the kinds of intimate family decisions considered in the above cases.

Finally, several of the exceptions to the Charlottesville curfew do accommodate the rights of parents. See Qutb, 11 F.3d at 496. These include the exception for minors accompanied by a parent and the exception for minors running an errand at the direction of a parent. In general, the same reasons that lead us to reject the constitutional challenges of the minor plaintiffs even under strict scrutiny apply to the claims of the parent plaintiffs. Cf. Bykofsky, 401 F. Supp. at 1264. The limited curtailment of juvenile liberty in the ordinance violates neither a minor's nor a parent's rights.

V.

Finally, we consider plaintiffs' claims that various exceptions to the ordinance are unconstitutionally vague. A law is not void for vagueness so long as it "(1) establishes `minimal guidelines to govern law enforcement,' and (2) gives reasonable notice of the proscribed conduct." Elliott v. Administrator, Animal and Plant Health Inspection Serv., 990 F.2d 140, 145 (4th Cir. 1993) (citation omitted). In statutes imposing criminal penalties, "the standard of certainty is higher." Kolender v. Lawson, 461 U.S. 352, 359 n.8 (1983). Yet clarity even in a criminal code can be a receding mirage. Thus the vagueness doctrine cannot "convert into a constitutional dilemma the practical difficulties in drawing

criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." Colten v. Kentucky, 407 U.S. 104, 110 (1972).

Striking down ordinances (or exceptions to the same) as facially void for vagueness is a disfavored judicial exercise. Nullification of a law in the abstract involves a far more aggressive use of judicial power than striking down a discrete and particularized application of it. Of course there will be hard cases under any law. And of course all the particular applications of any general standard will not be immediately apparent. That is no reason, however, for courts to scrap altogether the efforts of the legislative branch. It is preferable for courts to demonstrate restraint by entertaining challenges to applications of a law as those challenges arise. **(15)**

The Charlottesville ordinance provides an exception for those minors who are "exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly." Charlottesville, Va., Code § 17-7(b)(8). Plaintiffs insist that this exception accords standardless discretion to law enforcement officers to decide whether or not the exception applies. According to plaintiffs, it also forces citizens to learn a complex body of constitutional law in order to comprehend its scope.

We decline to punish the City for its laudable effort to respect the First Amendment. See CISPES (Committee in Solidarity with the People of El Salvador) v. FBI, 770 F.2d 468, 474 (5th Cir. 1985). A broad exception from the curfew for such activities fortifies, rather than weakens, First Amendment values. Plaintiffs basically attempt to place city councils between a rock and a hard place. If councils draft an ordinance with exceptions, those exceptions are subject to a vagueness

challenge. If they neglect to provide exceptions, then the ordinance is attacked for not adequately protecting First Amendment freedoms. It hardly seems fitting, however, for courts to chastise elected bodies for protecting expressive activity. The Charlottesville ordinance is constitutionally stronger with that protection than without.*

The First Amendment exception also does not accord unfettered discretion to law enforcement officials. Every criminal law, of course, reposes some discretion in those who must enforce it. The mere possibility that such discretion might be abused hardly entitles courts to strike a law down. Police Chief Wolford's deposition, relied on by plaintiffs, does not indicate an actual risk of arbitrary enforcement. In response to a question from plaintiffs' counsel about whether a late night conversation about politics between two fifteen-year-olds in a coffee house fell within the exception for First Amendment activities, he stated: "You're indoors, it's a public location, I, I think technically under the ordinance it may be a violation. I doubt whether we would deal with it." Such hedged deposition testimony about a speculative hypothetical does not demonstrate that police will enforce the curfew arbitrarily. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503 (1982).

---

*The dissenting opinion suggests that the First Amendment exception would be improved if it included a scienter element. See post at 52. A scienter requirement might serve a beneficial narrowing function if § 17-7(b)(8) imposed criminal liability. The provision, however, provides an exception from liability for persons who otherwise would be in violation of the curfew. It is not clear why the dissent would want to narrow this safe haven by requiring minors to satisfy an additional state-of-mind requirement.

(16)The First Amendment exception provides adequate notice to citizens. It is perfectly clear that core First Amendment activities such as political protest and religious worship after midnight would be protected. It is equally clear that rollerblading would not. Between these poles may lie marginal cases, which can be taken as they come. Id. at 503 n.21.

The ordinance also provides an exception for activities sponsored by civic organizations. Plaintiffs argue that the Supreme Court found the term "civic" to be vague when it struck down an ordinance that required permits for door-to-door solicitation but exempted several groups, including "Borough Civic Groups and Organizations." Hynes v. Mayor of Oradell, 425 U.S. 610, 621 (1976). We do not read Hynes to stand for the broad proposition that any use of the term civic is per se vague. The Court in Hynes found several of the terms used to describe the exempted groups, including "Borough Civic Groups and Organizations," to be unclear. Id. Here the language of the exception is clearer and includes activities sponsored by school and religious organizations in addition to civic organizations. Considered in this context, we believe that the City intended to give civic its ordinary meaning: "concerned with or contributory to general welfare and the betterment of life for the citizenry of a community or enhancement of its facilities." Webster's Third New International Dictionary (Unabridged) 412 (1961). We decline to find this everyday use of the term civic to suffer an ambiguity of constitutional magnitude. See Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

The ordinance also creates an exception in cases where a minor is involved in an emergency. Without citation to authority, plaintiffs pose a variety of hypothetical situations in which this exception may or may not apply. For example, they wonder whether the exception (17) would include the need to go to a

store to purchase cough medicine or a thermometer. Once again, the existence of questions at the margins does not justify striking down the exception altogether. A brief review of the exception illuminates many situations to which it plainly applies. The ordinance specifically defines emergency as "refer[ring] to unforeseen circumstances, or the status or condition resulting therefrom, requiring immediate action to safeguard life, limb or property." Charlottesville, Va. Code § 17-7(a). It further details that "[t]he term includes, but is not limited to, fires, natural disasters, automobile accidents, or other similar circumstances." Id. While "[t]here is little doubt that imagination can conjure up hypothetical cases" to test the meaning of emergency, these speculative musings do not render this term unconstitutionally vague. American Communications Ass'n v. Douds, 339 U.S. 382, 412 (1950).

Plaintiffs' vagueness claims threaten to make the drafting of a curfew ordinance an impossible task. The practical exceptions to the City's curfew shall not provide the cause of its demise.

VI.

Our dissenting colleague insists that the Charlottesville ordinance must satisfy strict scrutiny, that it is not narrowly tailored, and that it is void for vagueness. Under the dissent's stringent application of these standards, however, no curfew ever would pass constitutional muster. In particular, no ordinance would survive the dissent's version of strict scrutiny, which disregards the Supreme Court's recognition that such inquiry should not be "strict in theory, but fatal in fact." See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (internal quotation marks omitted). Any locality in the nation that chose to enact a curfew would ultimately see it picked to death in the courts. A brief look at the dissent's analysis indicates why this is so.

To begin with, the dissent downplays the interests of the community, namely Charlottesville's goals of promoting the well-being of its youngest citizens and of fostering parental responsibility. The dissent's suggestion that these interests are compelling only when the state proceeds in a manner "supportive of the parental role," post at 41, is not consistent with the prevalence of legislative measures (such as age limitations on drinking and on driving) that may, on occasion, **(18)** frustrate the desires of individual parents. Moreover, by granting a citizen's veto to every parent in the community, the dissent would convert the compelling interest requirement into a rule of unanimity. This high a constitutional bar is antithetical to the values of democratic innovation.

The same disablement of democratic authority is evident in the dissent's strict reading of means. The dissent does agree that Charlottesville's interest in reducing juvenile crime is compelling, but then subjects the curfew to an impossibly narrow tailoring standard. Tellingly, the dissent fails to point to less restrictive means that the City might have employed. Forbidding preventive measures such as curfews propels localities to the harshest of alternatives -- waiting for juveniles actually to commit criminal offenses and then apprehending, prosecuting, and punishing them. Neither minors nor the City would gain from this result.

Finally, no ordinance could ever meet the precision envisioned by the dissent's "strict vagueness standard." Post at 49. The dissent argues that the labyrinthine nature of First Amendment doctrine requires a curfew exception drawn in labyrinthine detail. Forcing city councils to pursue such an elusive goal would prevent them from ever passing an ordinance. The vagueness doctrine's basic notice principle does not impose such an impediment.

The Charlottesville curfew serves not only to head off crimes before they occur, but also to protect a particularly vulnerable population from being lured into participating in such activity. Contrary to the dissent's protestation, we do not hold that every such curfew ordinance would pass constitutional muster. The means adopted by a municipality must bear a substantial relationship to significant governmental interests; the restrictiveness of those means remains the subject of judicial review. As the district court noted, however, the curfew law in Charlottesville is "among the most modest and lenient of the myriad curfew laws implemented nationwide." Charlottesville's curfew, compared to those in other cities, is indeed a mild regulation: it covers a limited age group during only a few hours of the night. Its various exceptions enable minors to participate in necessary or worthwhile activities during this time. We hold that Charlottes-**(19)** ville's juvenile curfew ordinance comfortably satisfies constitutional standards.

Accordingly, we affirm the judgment of the district court. We do so in the belief that communities possess constitutional latitude in devising solutions to the persistent problem of juvenile crime.

AFFIRMED

(The ordinance is appended in its entirely at this point in the opinion, and, because it is already reprinted verbatim in petition, is omitted here).

MICHAEL, Circuit Judge, dissenting:

Today, the majority relegates kids to second-class citizenship by upholding Charlottesville's nighttime curfew for minors. Forbidding children to go out at night affects their fundamental rights, and such a restriction can be valid only if it withstands

strict scrutiny. The Charlottesville curfew ordinance fails the test because it sweeps too broadly and usurps rather than supports parental authority over child rearing. The ordinance has another constitutional defect as well. Although it is a crime to violate the ordinance, the crime is only vaguely defined. The curfew does not apply when minors are "exercising First Amendment rights." This exception is unconstitutionally vague, leaving children, their parents, and the police to guess whether particular conduct is punishable as a crime. I respectfully dissent.

The majority attempts to brush this dissent aside by claiming that under my approach "no curfew ever would pass constitutional muster," ante at 18. I can as easily say that under the majority's approach no curfew would ever fail constitutional muster. I'm afraid that my claim will be proven true. As long as the majority's standard is the law, a city council can pass a juvenile curfew as a routine measure because the justification is so easy to articulate. This should not stand under the Constitution. Children make up a quarter of our population, and their rights must not be ignored. A city council cannot order such a large segment of the community to stay at home for thirty-three hours of every week unless its curfew satisfies strict scrutiny. Subject- **(26)** ing Charlottesville's ordinance to this test does not subvert the "democratic authority" of the City Council, see ante at 18-19. On the contrary, the Council's authority must be exercised within constitutional bounds. The Council cannot, in the name of majority rule, take away constitutional rights of a minority, in this case all children under seventeen.

I.

Charlottesville's curfew targets all unemancipated persons under seventeen and applies between the hours of 12:01 a.m. and 5:00 a.m.on week nights and 1:00 a.m. and 5:00 a.m. on Friday and

Saturday nights (Saturday and Sunday mornings). See Charlottesville, Va., Code § 17-7(a), (b) (hereinafter City Code). The ordinance makes it unlawful for these minors to "remain" in public (including private property open to the public) during curfew hours unless one of the curfew's eight exceptions are met. See id. One of these exceptions allows a minor to remain in public when "the minor is exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly." Id. § 17-7(b)(8). A minor is also exempted from the curfew if he has written documentation that he is running an "errand" as directed by his parent and this document meets nine statutory criteria. See id. § 17-7(b)(6).1 Minors who violate the curfew are subject to criminal punishment, and so are parents who "knowingly permit, allow or encourage" their children to defy the curfew. See id. § 17-7(c).

On March 10, 1997, Daniel Schleifer and four other minors, two adult parents of these minors, and an eighteen-year-old adult brought suit against the City of Charlottesville seeking a declaratory judgment that the curfew ordinance is unconstitutional. In district court the minor plaintiffs argued their case as a Fourteenth Amendment equal protection

---

1 The written document must contain the following information: (1) the minor's name; (2) the authorizing parent's name, (3) signature, (4) address, and (5) telephone number; (6) the telephone number where this parent may be reached during the pendency of the errand; (7) a "brief" description of the errand; (8) the minor's destination or destinations; and (9) "the hours the minor is authorized to be engaged in the errand." See City Code § 17-7(b)(6).

violation that implicates their fundamental rights, including First Amendment and due process rights and the right to intrastate movement. The parent plaintiffs argued that the curfew's restrictions impermissibly burdened their due process right to exercise parental discretion and control over the rearing of their children by making the exercise of this discretion and control illegal. Finally, all plaintiffs challenged the statute as being void for vagueness under the Due Process Clause.2 The district court ruled for the City on these claims after a trial on the merits. I would reverse on the grounds that the curfew violates the Equal Protection Clause and is void for vagueness.
(27)
II.

Because the curfew criminalizes conduct of persons under the age of seventeen, the City's use of this age-based classification is subject to the limitations of the Fourteenth Amendment's Equal Protection Clause. Generally, laws making age-based classifications are subject to rational basis review, see Gregory v. Ashcroft, 501 U.S. 452, 470 (1991); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976), and thus are upheld if there is a rational relationship that ties the use of the classification to a legitimate governmental purpose, see Heller v. Doe, 509 U.S. 312, 319-21 (1993). However, when an age-based classification affects fundamental rights, a court must review the classification with "the most exacting scrutiny." See Clark v. Jeter, 486 U.S. 456, 461 (1988) (unanimous decision); see also Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990).

---

2 Like the majority, I read the plaintiffs' equal protection and due process claims as arising under the Fourteenth Amendment, rather than the Fifth Amendment as alleged in their complaint.

The Charlottesville curfew ordinance does implicate fundamental rights. Cf. Kolender v. Lawson, 461 U.S. 352, 358 (1983) (loitering statute implicates First Amendment liberties and"constitutional right to freedom of movement"); Nunez v. City of San Diego, 114 F.3d 935, 944-45 (9th Cir. 1997) (holding that curfew infringed minors' fundamental rights). Normally, this would require the City to demonstrate that the ordinance satisfies strict scrutiny. However, because this case involves the fundamental rights of minors, and not those of adults, the **(28)** majority concludes that equal protection requires only intermediate scrutiny. See ante at 4-5. I disagree. Like the Fifth and Ninth Circuits, I would hold that the Equal Protection Clause subjects to strict scrutiny all governmental classifications that impact fundamental constitutional rights. See Nunez, 114 F.3d at 945-46; Qutb v. Strauss, 11 F.3d 488, 492 & n.6 (5th Cir. 1993). Under this standard the Charlottesville curfew is unconstitutional.

A.

Some mention of the unique status of children in our society is necessary to set the stage for the explanation of why strict scrutiny is necessary. The Supreme Court has long recognized that "`[c]hildren have a very special place in life which the law should reflect.'" Bellotti v. Baird, 443 U.S. 622, 633 (1979) (Bellotti II) (plurality opinion). Accordingly, the Bellotti II plurality identified certain factors that the Court has used to justify situations where "the constitutional rights of children cannot be equated with those of adults." Id. at 634 (identifying the factors as "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."). These factors reflect the view that "[t]he unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special

needs of parents and children." See id. at 633-34. This focus on the family and the parent-child relationship is central in the Court's decisions and must be examined to understand when there is justification for concluding that a minor's constitutional rights are not coextensive with those of an adult.

The Supreme Court has consistently reflected the traditional Western concept of the family as a "unit with broad parental authority over minor children." See Parham v. J.R., 442 U.S. 584, 602 (1979). Indeed, the Court's "`constitutional interpretation has consistently recognized [that] parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.'" Bellotti II, 443 U.S. at 638 (quoting Ginsberg v. New York, 390 U.S. 629, 639 (1968)). This authority is undoubtedly broad. When parental control comes into play, "unemancipated minors lack some of the most fundamental rights of self-determination -- including even the right of liberty in its narrow sense, i.e., the right to come **(29)** and go at will." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995).

However, a parent's broad authority does not generally carry over to the state. "[O]ur constitutional system long ago rejected any notion that a child is `the mere creature of the State' and, on the contrary, asserted that parents generally `have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.'" Parham, 442 U.S. at 602 (quoting Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925)); see also Bellotti II, 443 U.S. at 637; Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). The Court has repeatedly said that it is "`cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for

obligations the state can neither supply nor hinder.'" See Bellotti II, 443 U.S. at 638 (alteration in original) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)). This broad recognition of the parents' right to control the upbringing of their children and of constitutional deference to parental authority is linked to the parents' duty to raise and protect their children. See Lehr v. Robertson, 463 U.S. 248, 257-58 (1983); Meyer v. Nebraska, 262 U.S. 390, 400 (1923). This deference to parents rests on the strong presumptions that "natural bonds of affection lead parents to act in the best interests of their children" and that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." See Parham, 442 U.S. at 602, 603; see also Bellotti II, 443 U.S. at 637; Yoder, 406 U.S. at 232.

Only in limited instances is the state able to assert a parent's broad power to control the activities of minors. For example, when the state acts as the legal guardian for a child, it will assume much, if not all, of a parent's traditional prerogatives. Similarly, the teachers and administrators of a public school will act "in loco parentis" while children are in their physical custody because parents"`delegate part of [their] authority'" to the school by placing their children under its instruction. See Vernonia, 515 U.S. at 655 (quoting 1 W. Blackstone, Commentaries on the Laws of England 441 (1769)); Bethel Sch. Dist.**(30)** No. 403 v. Fraser, 478 U.S. 675, 682 (1986); id. at 688 (Brennan, J., concurring in the judgment).**3**

---

3 The majority overlooks Vernonia's real thrust by quoting it to suggest that a minor's constitutional rights with respect to the state are subject to "customary limitations," ante at 5, that"includ[e] even the right of liberty in its narrow sense, i.e., the right to come and go at will," id. (quoting Vernonia, 515

In a similar way, the state (as parens patriae) may occasionally displace the parents' primary role in child rearing in order to protect a child's welfare. Thus, the state may trump parental discretion in delinquency proceedings (because parental control has already faltered), see Schall v. Martin, 467 U.S. 253, 265 (1984); In re Gault, 387 U.S. 1, 17 (1967), or in situations where a child's "physical or mental health is jeopardized," see Parham, 442 U.S. at 603; Yoder, 406 U.S. at 233-34. In these circumstances, the strong presumption that parents are able and willing to act in the best interests of their children may be rebutted. See Parham, 442 U.S. at 602. The state's power to displace parental discretion is limited, however, and must be justified on a case-by-case basis.

---

3 cont'd

U.S. at 654). Had the majority quoted the very next line in Vernonia, it would be obvious that the case makes clear that minors lack some of the most fundamental rights of self-determination with respect to their parents, not the state. See 515 U.S. at 654 ("They are subject, even as to their physical freedom, to the control of their parents or guardians."). Vernonia repeatedly emphasized that a minor's rights "vis-a-vis the State may depend on the individual's legal relationship with the State" and that "central" to the Court's decision was the fact that the children claiming a constitutional privacy right had "been committed to the temporary custody of the State as schoolmaster." See id. at 654; see also id. at 655, 656, 662, 665; cf. Nunez, 114 F.3d at 944-45 (rejecting as "out of context" the same quotation the majority uses from Vernonia).

> That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. **(31)**

Id. at 602-03 (citations omitted). Indeed,"[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." Id. at 603 (emphasis added). Thus, except in special circumstances, the state normally must defer to the exercise of a broad degree of parental discretion.

It is also clear that while the state does have an independent interest in the welfare of children, this interest may be superseded by the parents' right to exercise broad discretion in raising their children. See, e.g., Yoder, 406 U.S. at 229-30; Pierce, 268 U.S. at 534-35; Meyer, 262 U.S. at 400. Consequently, the rights of minors in relation to the state must be analyzed to consider not only the interests of the minor and the state but also the interests of parents. Cf. Parham, 442 U.S. at 600 (minor's "interest is inextricably linked with the parents' interest in and obligation for the welfare and health of the child"). Thus, the analysis of a minor's rights is complicated by the addition of this third party (a parent) who can bolster either the state's claim of authority or the minor's assertion of rights. Cf. Yoder, 406 U.S. at 231(recognizing that "competing

interests of parents, children, and the State" requires additional analysis).**4**

Although the Court's language in Prince v. Massachusetts, 321 U.S. 158 (1944), "taken at its broadest sweep" would lend support to the majority's expansive view of state power, Prince has limited application beyond its facts. See Yoder, 406 U.S. at 229. Prince involved a challenge to a conviction under a child labor law that made it criminal for parents to allow boys under the age of twelve and girls younger than eighteen to sell newspapers and similar items. See Prince, 321 U.S. at 160-61. The Court sustained the conviction of Mrs. Prince for taking her ward (and niece), a nine-year-old girl, with her to assist in selling religious literature during the evening hours. See id. at 161-62; id. at 171 (Murphy, J., dissenting); see also Ginsberg, 390 U.S. at 638-39. The Court ruled that the state's interests in protecting the nine-year-old from psychological and physical harms that might result from Prince's activities were sufficient to justify the conviction. See 321 U.S. at 169-70. The Court was careful to state, however, that its decision did "not extend beyond the facts the case presents." See id. at 171. Accordingly, the Court has since limited Prince's application to situations

---

4 Recently, in Reno v. ACLU, 117 S. Ct. 2329, 2348 (1997), the Court recognized that it is "clear that the strength of the government's interest in protecting minors is not equally strong" in all applications of the Communications Decency Act. Specifically, the Court indicated that the government's interest in protecting minors from indecent material would be greatly diminished where "a parent allow[s] her 17-year-old to use the family computer to obtain information on the Internet that she, in her parental judgment, deems appropriate." See id. (emphasis added).**(32)**

where there is a "`substantial threat'" of harm to the "physical or mental health of the child or to the public safety, peace, order, or welfare." See Yoder, 406 U.S. at 230. In light of Yoder and the facts of Prince, I read Prince to allow a state to override parental discretion when the exercise of this discretion creates a substantial threat to the health and safety of children. In assessing this threat, Prince suggests that very young children are particularly vulnerable to harm.

This discussion underscores the Supreme Court's recognition of the special status of children and the predominance of the family unit. In particular, it underscores the Court's deference to the traditional authority of parents over the activities of their children. With this background, I now turn to the proper standard of scrutiny that must be applied in this case.

B.

The minors' equal protection challenge in this case must be analyzed under strict scrutiny. This conclusion flows from the basic question the majority ignores. Why are the federal constitutional rights of persons who are defined as minors under state law different from those of adults? The answer is that a minor's constitutional rights are basically the same as those of adults, but in certain situations there may be "significant state interest[s] . . . that [are] not present in the case of an adult" that will support a broader authority to regulate minors. See Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).**5**

---

5 There are limited differences imbedded in our Constitution. For instance, the Twenty-Sixth Amendment guarantees the right to vote only to those eighteen and older. See U.S. Const. amend. XXVI **(33)**

When these interests justify regulation, they do so not because a minor's constitutional rights are always inferior to those of an adult but rather because the government's specific interests as regards minors are sometimes sufficient to allow a regulation to survive strict scrutiny. Accordingly, I would hold that the "fundamental rights" of minors are no less fundamental than those of adults and, thus, must be protected with the same vigor under a strict scrutiny analysis. See Nunez, 114 F.3d at 945.

1.

This conclusion is drawn from the Supreme Court's general approach to analyzing the rights of minors. The Court makes it clear that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." See Danforth, 428 U.S. at 74; see also Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 511 (1969) ("[s]tudents . . . are `persons' under our Constitution [who] are possessed of fundamental rights which the State must respect"); In re Gault, 387 U.S. 1, 13 (1967) ("whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone"). Indeed, the simple fact of age minority cannot by itself justify a dilution of constitutional protection. See Bellotti v. Baird, 443 U.S. 622, 633 (1979) (Bellotti II) (four-vote plurality opinion) ("A child, merely on account of his minority, is not beyond the protection of the Constitution."). Because "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," Danforth, 428 U.S. at 74 (emphasis added), all persons, regardless of age, possess these rights under our system. Cf. Bellotti II, 443 U.S. at 635 ("children generally are protected by the same constitutional guarantees against governmental deprivations as are adults" (emphasis added)).

While minors generally possess the same rights against govern-

mental deprivations as adults, considerations unique to minors can lend more weight to the government's interest in regulating this class. See Nunez, 114 F.3d at 945; Qutb, 11 F.3d 492 n.6. In Bellotti II a four-justice plurality noted that the Supreme Court has used three reasons to "justify[ ]" treating minors differently from adults under the Constitution: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the (34) importance of the parental role in child rearing." 443 U.S. at 634. If minors are to be accorded constitutional rights unequal to adults by reason of a particular regulation, these factors must support the government's assertion of greater authority. "`It is only upon such a premise . . . that a State may deprive children of . . . rights [when a similar deprivation] would be constitutionally intolerable for adults.'" Bellotti II, 443 U.S. at 635 n.13 (quoting Ginsberg, 390 U.S. at 650 (Stewart, J., concurring in the result)) (emphasis added).

The principle is illustrated by the Supreme Court's treatment of statutes forbidding a minor to obtain an abortion without parental consent. The Court has steadfastly insisted that such statutes must have a judicial bypass procedure. See, e.g., Bellotti II, 443 U.S. at 647-48 (consent statute); Danforth, 428 U.S. at 72-75 (same). The analysis used by the Court in Danforth is particularly instructive. After ruling that a spousal consent provision was unconstitutional, the Court addressed the statute's parental consent provision, saying that "much of what has been said above, with respect to [spousal consent], applies with equal force to [parental consent]." 428 U.S. at 74. The Court explained that "[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights." Id. However, it acknowledged that "the State has somewhat broader authority to regulate the activities of children than of adults." See id. Consequently, the Court explained: "It remains, then, to examine whether there is any significant state interest

in conditioning an abortion on the consent of a parent . . . that is not present in the case of an adult." See id. at 75 (emphasis added). This analysis demonstrates that the Court did not assume that the state always possesses broader authority to regulate children. To the contrary, it looked to whether there were significant interests specific to minors that justified the law, indicating that the law would be unconstitutional if these interests did not provide sufficient support for broader authority to regulate minors. After examining the interests advanced by the state, the Court struck down the parental consent law because it lacked "sufficient justification." See id. at 75.

The Court applied the same reasoning it used in Danforth to its subsequent parental consent cases. In Bellotti II the Court constructed its judicial bypass requirement to permit the consent undertaking to apply only to those minors who could justifiably be treated differently **(35)** from adults. Thus, a bypass procedure must allow a minor to demonstrate that either (1) she is mature and informed enough to make the abortion decision herself or (2) the abortion is in her best interests. See Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 511 (1990) (Akron II); Bellotti II, 443 U.S. 647-48. First, the state's justification that minors generally are not able "to make critical decisions in an informed, mature manner," Bellotti II, 443 U.S. at 634, is lost when a minor is adjudged mature and informed. Without the immaturity justification, the state has little reason to, and indeed cannot, require a parent's consent. Cf. Danforth, 428 U.S. at 75 (parent's interest in abortion decision is outweighed by mature minor's privacy right). Similarly, Bellotti's final consideration, that greater restrictions may be imposed on minors to reinforce the "importance of the parental role in child rearing," Bellotti II, 443 U.S. at 634, is premised on the presumption that parents will discharge their "responsibility for [their] children's well-being." See id. at 638-39. When a minor can demonstrate to a court that an

abortion is in her best interests, the state's interest in involving the parents is reduced so much that the state can no longer require a minor to obtain parental consent. Therefore, when a minor is mature or an abortion is in her best interests, parental consent requirements are unconstitutional because the state's interests (specific to minors) do not justify a restriction that could not be applied to adults.

The parental consent example demonstrates that the government may sometimes, but not always, have interests in protecting minors that will allow it to impose special restrictions that narrow a minor's constitutional rights. It follows that courts must look at the regulation in question to determine if the state has sufficient justification to claim that a minor's rights are not the equal of an adult's. Only through this process can the state-defined age of majority have any significance insofar as constitutional rights are concerned.

2.

We know that we must evaluate the special interests that may justify a greater degree of governmental authority over minors in the context of the specific regulation. Still, the question remains as to which level of scrutiny is appropriate in cases involving constitutional rights. Logic compels that strict scrutiny apply.

(36) It is clear from the discussion above that the majority's categorical approach is wrong. The majority would apply intermediate scrutiny in all cases involving minors, even those in which the government has no justification specific to minors for infringing upon their fundamental rights. In the latter situation the governmental interest in regulating minors under the majority's approach is identical to its interest in regulating adults. Yet the rights of minors could still be treated differently

because their "fundamental" rights are not protected with strict scrutiny review. This has far ranging implications. Legislative bodies can pass many laws regulating conduct that would pass intermediate scrutiny but fail strict scrutiny. Under the majority's approach, such laws could be applied to all minors but could not be applied to any adults (whose fundamental rights are protected by strict scrutiny), even though the government had no reason to regulate minors any more than it did adults. The majority's holding, therefore, allows a minor to be deprived of constitutional rights when a similar deprivation would be constitutionally intolerable for adults, even though the state lacks any reason for different treatment. This result cannot be justified and essentially creates a second-class citizenship for all persons under the age of majority. For these persons, federal constitutional rights will "mature and come into being magically only when [they] attain[ ] the state-defined age of majority," Danforth, 428 U.S. at 74.**6**

Moreover, the majority's approach is completely inconsistent with the Supreme Court's decisions on parental consent in the abortion context. As discussed above, the state cannot constitutionally regulate a minor's abortion rights by requiring

---

6 Although I disagree with the details of the approach taken by the district court, its analysis properly focused on the existence or absence of interests specific to minors that would justify"accord[ing] the state more regulatory latitude in governing children in certain circumstances." Schleifer v. City of Charlottesville, 963 F. Supp. 534, 541 (W.D. Va. 1997) (preliminary injunction analysis that was adopted in final ruling) (emphasis added). Under its approach, only "[w]hen the Bellotti factors . . . cut in favor of increased state oversight" will intermediate, rather than strict, scrutiny apply. See id. at 541-427.**(37)**

parental consent unless the regulation provides a judicial bypass. The majority's holding, however, would allow the state to regulate a minor's abortion rights if the state's regulation "`is substantially related' to `important' governmental interests," ante at 5. Such a result is clearly at odds with the Supreme Court's approach, as the state always has an important interest in regulating abortions. Beginning with Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court has repeatedly recognized the state's "important and legitimate interest in protecting the potentiality of human life." Id. at 162. See also Planned Parenthood v. Casey, 505 U.S. 833, 871 (1992); Harris v. McRae, 448 U.S. 297, 324-25 (1980). This interest by itself would enable state abortion statutes to meet intermediate scrutiny. Therefore, the majority's holding that intermediate scrutiny should apply to the regulation of minors simply cannot be squared with the Supreme Court's insistence that a state cannot require a mature minor to obtain parental consent for an abortion. Indeed, if the majority was correct, the state could completely ban abortions for women under the age of eighteen. This confirms the fallacy of applying intermediate scrutiny to cases involving the fundamental rights of minors.

I would avoid these difficulties by applying strict scrutiny to all equal protection challenges involving fundamental rights, regardless of whether minors or adults are involved. Under this approach, minors must be treated the same as adults whenever the government lacks interests specific to minors to support more restrictive regulatory authority over them. Cf. Bellotti II, 443 U.S. at 635 n.13; Danforth, 428 U.S. at 74-75. However, when circumstances trigger governmental interests that are particular to minors, these interests, when coupled with the government's other interests, can make the government's claim for greater restrictions on minors much stronger. If these interests taken as a whole are compelling, the government's regulation (if narrowly tailored) will survive strict scrutiny with

respect to minors, even though it would fail the test in the case of adults. See Nunez, 114 F.3d at 945 ("the Bellotti framework enables courts to determine whether the state has a compelling interest justifying greater restrictions on minors than on adults"); Qutb, 11 F.3d at 492 n.6 (same). This approach therefore provides a principled approach for deciding when children may be treated differently from adults for constitutional purposes.7

The Fifth and Ninth Circuits adopt this approach and analyze minors' equal protection challenges with strict scrutiny when fundamental rights are implicated. See Nunez, 114 F.3d at 945-46; Qutb, 11 F.3d at 492 & n.6; cf. Hutchins v. District of Columbia, 144 F.3d 798, 805-10 (D.C. Cir. 1998) (opinion of Rogers, J.) (intermediate scrutiny); id. at 825-27 (Tatel, J., concurring in the judgment) (strict scrutiny); id. at 828 (Silberman, J., dissenting) (finding that no fundamental right was affected by curfew and therefore applying rational basis

---

7 The majority relies on the plurality opinion in Carey v. Population Services International, 431 U.S. 678, 691-99 (1977), to support its argu-(38) ment that the Charlottesville curfew should be subjected to less than strict scrutiny. See ante at 5. Carey is a slender reed for this proposition. First, Carey's plurality opinion was decided before Bellotti II, and later cases have followed the reasoning of Bellotti II. Second, Carey itself is best read as a recognition that the state's unique and significant interests in regulating children will make it easier to justify greater restrictions on minors than on adults. See Carey, 431 U.S. at 693 (plurality opinion).

review to age-based equal protection challenge).**8** I would join these circuits and hold that the Equal Protection Clause subjects all governmental classifications impacting on the fundamental constitutional rights of minors to strict scrutiny.

C.

The Charlottesville curfew ordinance cannot withstand strict scrutiny and should be struck down. The Equal Protection Clause protects our constitutional rights by requiring that the government clear a high hurdle before regulating in the realm of fundamental rights. Under strict scrutiny review, "statutory classifications impinging on [a fundamental] right must be narrowly tailored to serve a compelling governmental interest." Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 666 (1990); see also Memorial Hosp v. Maricopa County, 415 U.S.

---

8 **Reno v. Flores**, 507 U.S. 292, 301-05 (1993), indicates that strict scrutiny should apply when the fundamental rights of minors are involved. In Flores a class of minors challenged an INS regulation that requires juvenile aliens to be placed in institutional group care facilities during the pendency of deportation proceedings if a guardian or adult relative is not available to take custody. The Court recognized that strict scrutiny applies "when fundamental rights are involved," see id. at 302, 305, but it rejected the minors' due process claim because it found that no fundamental right existed under the circumstances of the case. See id. at 305; cf. id. at 304 (stating that "the child's fundamental rights must not be impaired" by INS). The approach adopted by the Fifth and Ninth Circuits is therefore consistent with Flores' implication that strict scrutiny applies when a minor's fundamental rights are in the balance.**(39)**

250, 269 (1974). The Charlottesville ordinance fails the strict scrutiny test, notwithstanding its stated (and worthy) objectives of (1) reducing juvenile crime, (2) promoting the safety and well-being of juveniles, and (3) fostering and strengthening parental responsibility.

1.

I quite agree with the majority that protecting the community from serious crime is a compelling governmental interest. See ante at 6. The problem is that the Charlottesville curfew is not narrowly tailored to forward this goal. "Statutes affecting constitutional rights must be drawn with `precision,' and must be `tailored' to serve their legitimate objectives. . . . [I]f there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, [the government] may not choose the way of greater interference. If it acts at all, it must choose `less drastic means.'" Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

By restricting the freedom of minors during curfew hours, the ordinance treats all minors under the age of seventeen as a threat to society in order to protect the community from juvenile crime. This broad restriction is not narrowly tailored to meet its objective of crime prevention. The ordinance treats all minors the same even though an exceedingly small percentage commit crimes. The Equal Protection Clause forbids such a crude grouping when fundamental rights are at stake, and limiting the curfew's hours and providing exceptions does not diminish this shortcoming.

This is not to say that emergency curfews that are broadly applicable and limited in duration are unconstitutional. Our circuit has previously, and properly, ruled that such emergency

measures are a proper exercise of the state's police power. See, e.g., United States v. Chalk, 441 F.2d 1277, 1280-83 (4th Cir. 1971). Here, however, we have a curfew with no sunset provision -- a curfew that sweeps in a vast class, all minors under seventeen, most of whom are law-abiding. The (40) Equal Protection Clause does not permit such a broad segment of society to be kept off the streets every night with the simple generalization, "We want to prevent crime." Narrow tailoring requires something less drastic.

2.

The City's second objective of promoting the safety and well-being of juveniles also falls short under strict scrutiny. This interest is not compelling in this case because the curfew displaces parental authority. Indeed, the majority says only that the City has a "strong" interest in protecting the youngest members of society from harm. See ante at 6-7. "Strong" interests are not sufficient to satisfy strict scrutiny. Only compelling interests suffice.

The City's stated interest in protecting minors under the age of seventeen is not compelling here because the curfew was not designed to be supportive of the parental role. Bellotti II recognized that "restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for . . . full growth and maturity" and therefore can justify an increased governmental authority to regulate the protected activities of minors. See 443 U.S. at 338-39 (emphasis added). This authority can be present when the governmental interest in regulation complements the traditional authority of the parent. By supporting the exercise of parental discretion, the state aligns its regulatory power with the interests of parents who have broad discretion to control the activities of their children. The combined interests of parents

and the state therefore strengthen the justification for governmental regulation. Ginsberg, for example, prohibited the direct sale of pornographic magazines to minors in order to strengthen parents' control over their children's access to such material. See 390 U.S. at 631, 639. The Court was careful to note, however, that the government did not displace parental authority: "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." See id. at 639; see also Reno v. ACLU, 117 S. Ct. at 2346-48. Laws like the one in Ginsberg may thus be justified because they defer to parental authority and decisionmaking.

(41)

The Charlottesville ordinance, however, paternalistically displaces the exercise of parental discretion by making it illegal for parents to allow their children to move about independently at night. Yet parents are better able to assess their children's maturity and capacity for judgment than a city council. Parents may legitimately decide that the best way to raise their children is to permit them to be out on their own after midnight on occasion. See Nunez, 114 F.3d at 952. In other words, parents may legitimately conclude that the risk of granting children some independence is small compared to the benefits resulting from the gradual development of maturity and judgment that is needed in preparation for a responsible adult life. This exercise of parental discretion is impossible under the ordinance.[9]

---

9 The curfew's sixth exception allows a minor to run an "errand" for his parent if he carries a signed document meeting nine statutory criteria. See City Code § 17-7(b)(6). This rigid exception, with its bureaucratic demand for detail, does not afford parents the discretion to allow their children to operate with any degree of independence. See supra note 1 (listing nine requirements).

Indeed, the ordinance was purposefully designed to displace parental discretion with the will of the City Council. On the day the curfew was enacted, the Council's agenda said the following about the curfew's purpose: "parental responsibility for the whereabouts of their children is the norm and where that does not exist, then the legal sanction should enforce such responsibility. Further, well communicated curfew ordinances . . . impose a community-wide standard on parents who are unable or unwilling to set such limits." (Emphasis added). Rather than supporting the parental role, this curfew supersedes it. It reflects the "statist notion that governmental power should supersede parental authority in all cases because some parents" fail to exercise control over their children. See Parham, 442 U.S. at 603. This governmental paternalism is "repugnant to American tradition." Id. Consequently, because the curfew attempts to achieve its stated purpose of promoting the safety and well-being of minors by displacing parental authority over the upbringing of children, the curfew does not serve a compelling governmental interest. **(42)**

3.

It follows that the ordinance's third stated purpose of fostering and strengthening parental responsibility also falls short. Ginsberg and Bellotti II recognize that laws "supportive of the parental role," Bellotti II, 443 U.S. at 638 (emphasis added), may justify some limitation on the constitutional rights of minors. However, when laws displace the primacy of parental discretion by imposing community-wide norms, the traditional authority of parents over child rearing is no longer available to support any limitation on the rights of minors. The curfew's attempt to foster and strengthen parental responsibility by displacing parental authority does not support a compelling state interest.

For these reasons, I would hold that the Charlottesville curfew fails to satisfy strict scrutiny and thus violates the Equal Protection Clause.

III.

Even if I could conclude that Charlottesville's curfew passed strict scrutiny, I would hold that the ordinance as adopted is void for vagueness under the Due Process Clause. More specifically, I would hold that the ordinance's First Amendment "exception" is impermissibly vague.

A.

The vagueness doctrine of the Due Process Clause"requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Although due process requires that a statute satisfy both requirements, the second is of special importance: "`a legislature [must] establish minimal guidelines to govern law enforcement'" and prevent arbitrary enforcement. See id. at 357-58 (citation omitted). When statutory language lacks sufficient "definiteness or certainty of expression," id. at 357, enforcement of the law is left to the purely subjective decisions of the police, prosecutors, and juries. See id. at 358; Village of Hoff- (43) man Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982) (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)). Our Constitution's guarantee of due process of law makes this unacceptable. As the Supreme Court recognized a long time ago,

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders,

> and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

Kolender, 461 U.S. at 358 n.7 (quoting United States v. Reese, 92 U.S. 214, 221 (1875)). In other words, "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." Baggett v. Bullitt, 377 U.S. 360, 373 (1964). The law itself must draw a sufficiently clear line between the legal and the illegal for both our police and our citizens.

B.

Vagueness challenges may be brought against a statute "on its face" without regard to specific conduct, "as applied" to the plaintiff's conduct, or on both grounds. Facial challenges strike at the heart of the statute, and, if successful, invalidate any and all application of the challenged provision until it is given a construction that sufficiently clarifies it. See Steffel v. Thompson, 415 U.S. 452, 474 (1974); cf. Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (as applied). I therefore agree with the majority that facial invalidity on vagueness grounds is strong medicine that is to be administered infrequently. See ante at 15. I disagree, however, with the majority's apparent belief that courts have discretion to avoid invalidating a facially unconstitutional statute. Cf. id. ("It is preferable for courts to demonstrate restraint by entertaining challenges to applications of a law as those challenges arise"). Courts rarely invalidate a law for facial vagueness. This is not because courts exercise discretionary restraint but because few facial challenges satisfy the high burden normally imposed. As a general rule, a law is vague on its face "only if [it] is impermissibly vague in all of its applications." See Hoffman Estates, 455 U.S. at 495 & n.7. **(44)**

What the majority ignores is the exception to this general rule: when "a law reaches `a substantial amount of constitutionally protected conduct,'" facial vagueness challenges are "permit[ted]" and a plaintiff may attack the law "`as being vague as applied to conduct other than his own.'" See Kolender, 461 U.S. at 358 & n.8 (citations omitted) (First Amendment rights and freedom of movement affected by regulation of loitering and wandering); see also Hoffman Estates, 455 U.S. at 494-95 (recognizing that general rule applies only to statutes that "implicate[ ] no constitutionally protected conduct" (emphasis added)); Gooding v. Wilson, 405 U.S. 518, 521 (1972); Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964) (facial challenge to law restricting international travel). This exception is "logically related and similar" to the doctrine of substantial overbreadth, see Kolender, 461 U.S. at 358 n.8, in that it is necessitated by the chilling effect that vague laws can have on the exercise of protected freedoms. As the Supreme Court has explained,

> The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

NAACP v. Button, 371 U.S. 415, 432-33 (1963) (citations and footnote omitted); see also Keyishian v. Board of Regents, 385

U.S. 589, 604, 609 (1967) ("The danger of [a] chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [individuals] what is being proscribed."); Kolender, 461 U.S. at 358 n.8 (citing Button and Keyishian to support exception to general rule). Especially, then, when chilling effects are a danger and a "substantial amount" of protected activity is implicated, facial challenges must be permitted. In other words, we do not (45) have to wait for case-by-case judicial review of particular applications of the law.

Because the City's curfew regulates a substantial amount of protected activity, I would hold that it is subject to a facial challenge. The Supreme Court's decision in Kolender all but mandates this conclusion. In Kolender the Court held that a California loitering statute was unconstitutionally vague on its face. The law made it a crime for persons who "loiter or wander on the streets" to fail to provide "credible and reliable" identification when a peace officer requests it under circumstances that would justify a Terry stop. See 461 U.S. at 353, 357. See generally Terry v. Ohio, 392 U.S. 1 (1968), and later cases. The Court permitted a facial challenge because it found that the "law reache[d] a substantial amount of constitutionally protected conduct," see Kolender, 461 U.S. at 358 n.8 (internal quotation marks omitted), notwithstanding the dissenting argument that the law was not "impermissibly vague in all of its applications" and could not be facially attacked because it had an "unmistakable core that a reasonable person would know is forbidden," id. at 370, 371-72 (emphasis added). The concern that led the Court to allow the facial challenge was the law's "`potential for arbitrarily suppressing First Amendment liberties'" and the "constitutional right to freedom of movement." See id. at 358 (quoting Shuttlesworth v. Birmingham, 382 U.S. 87, 90 (1965)). The same concerns underlie the curfew in this case. The main difference is

Charlottesville's First Amendment"exception," but, as I explain below, this exception is itself impermissibly vague and therefore cannot save the statute from a facial challenge. Indeed, the need in this case for facial review is even stronger than that in Kolender because the curfew ordinance applies to all law-abiding minors under the age of seventeen. The law in Kolender, by contrast, required credible and reliable identification only when peace officers had already made a justifiable Terry stop, that is, after they had temporarily detained a suspect because of "a reasonable and articulable suspicion that the person seized [wa]s engaged in criminal activity," Reid v. Georgia, 448 U.S. 438, 440 (1980) (per curiam) (following Terry). Accordingly, Kolender makes clear that a facial challenge is appropriate in this case.

The majority errs in asserting that because "core First Amendment activities" are protected by the ordinance, "marginal cases" may be **(46)** challenged as the statute is applied, see ante at 17. Even assuming that "core" activities are protected, this argument appears to parallel the dissenting view rejected by Kolender. The proper inquiry is not whether some core values are protected but whether the curfew "reaches `a substantial amount of constitutionally protected conduct,'" Kolender, 461 U.S. at 358 n.8 (quoting Hoffman, 455 U.S. at 494). The First Amendment protects a substantial amount of conduct in addition to "political protest and religious worship," ante at 17, and the vagueness doctrine must be applied to protect these rights.**10** Deferring review for as- applied

---

10 The majority's citations to Hoffman Estates do not support the conclusion that federal courts may wait for as-applied challenges in "marginal cases," see ante at 17. Hoffman Estates clearly limits its analysis to those cases in which "no constitutionally protected conduct" is implicated by the

challenges impermissibly risks chilling the exercise of a substantial amount of constitutionally protected activity. Cf. 11126 Baltimore Blvd., Inc. v. Prince George's County, 58 F.3d 988, 993-94 (4th Cir. 1995) (en banc) (ruling that "courts must permit" facial challenge when there is significant risk of chilling First Amendment speech because chill "`can be effectively alleviated only through a facial challenge'" (quoting City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988)). I now turn to why Charlottesville's curfew is void for vagueness.

C.

"A law is considered [unconstitutionally] vague if `a person of normal intelligence must guess at its meaning and differ as to its application.'" Elliott v. Administrator, Animal & Plant Health Inspection Serv., 990 F.2d 140, 145 (4th Cir. 1993) (quoting Connally v. General Constr., 269 U.S. 385, 391 (1926)); see also United States v. Lanier, 117 S. Ct. 1219, 1225 (1997) (unanimous decision); Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984). Although this standard applies generally to vagueness challenges, "[t]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment," Hoffman Estates, 455 U.S. at 498. When a statute involves the "economic regulation" of business, it is "subject to a less (47) strict vagueness test." Id. at 498. Similarly, if a law includes a scienter requirement, this too will relax the degree of clarity required because scienter can "mitigate a law's

---

10 cont'd

challenged law. See 455 U.S. at 494-95, 497; Kolender, 461 U.S. at 458 n.8. A wait-and-see approach is justified only when there is no risk of chilling a substantial amount of protected activity.

vagueness." See id. at 499. On the other hand, "the standard of certainty is higher" for statutes that impose criminal, as opposed to civil, sanctions. See Kolender, 461 U.S. at 358 n.8; Hoffman Estates, supra at 498-99. The last and "most important factor affecting the [degree of] clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights." Id. at 499. If it does, "a more stringent vagueness test should apply" so that protected activity will not be chilled. See id.; see also Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."); Grayned, 408 U.S. at 109 ("[W]here a vague statute `abut[s] upon sensitive areas of basic First Amendment freedoms,' it `operates to inhibit the exercise of [those] freedoms.'" (second and third alterations in original)); Button, 371 U.S at 432 (standard is "strict in the area of free expression"). These factors all point to the conclusion that the Charlottesville curfew must be evaluated for vagueness under a strict standard. Under that standard, I would hold that the ordinance's First Amendment exception violates the Due Process Clause.**11**

---

11 Federal courts do not look simply to the statutory language to determine if the law is vague. If a federal statute is involved, a federal court may construe the disputed provision to remove its vagueness. See United States v. 12 200-ft. Reels of Super 8mm. Film, 413 U.S. 123, 130 n.7 (1973); cf. CISPES v. FBI, 770 F.2d 468, 473-75 (5th Cir. 1985) (construing federal statute to avoid overbreadth). Likewise, when a state provision is challenged as vague on its face, a federal court must "`consider any limiting construction that a state court or **(48)**

D.

The last of the curfew's eight statutory exceptions allows a minor to remain in public during curfew hours when "the minor is exercising First Amendment rights protected by the United States Constitution, such as the free exercise of religion, freedom of speech and the right of assembly." City Code § 17-7(b)(8). Because this exception operates in an area of protected conduct, it must satisfy a strict vagueness standard so as not to chill the exercise of constitutional rights. Under this standard, the curfew's First Amendment "exception" makes the ordinance impermissibly vague. By defining the exception in vague and ambiguous terms, the ordinance impermissibly forces persons of normal intelligence to guess as to what conduct is illegal and fails to provide minimal guidelines for law enforcement.

The vagueness of the First Amendment exception is intuitively plain. Indeed, its language is anything but clear. What are "First Amendment rights"? What is considered to be "speech"? Does it include written communication? What of expressive conduct that does not involve oral or written communication? What types of speech are "protected" by "freedom of speech"? Is commercial speech protected? If so, to what extent? What is the "free exercise" of religion? And what of the "right of assembly"?

---

11 cont'd

enforcement agency has proffered.'" See Ward v. Rock Against Racism , 491 U.S. 781, 795-96 (1989) (quoting Hoffman Estates, 455 U.S. at 494 n. 5). If no narrowing interpretation is provided by the state, however, a federal court is "without power to remedy the [statute's] defects by giving [it] constitutionally precise content." See Hynes v. Mayor of Oradell, 425 U.S. 610, 622 (1976); see also Smith v. Goguen, 415 U.S. 566, 575 (1974).**(48)**

Do two friends have the "right" to "assemble" or meet at a coffeehouse? This says nothing of the general First Amendment rights (e.g., association, press, petition) that the City's exception leaves unmentioned. The questions above are difficult enough for courts, Congress, and constitutional scholars, let alone for someone with no legal training. And when answers are given, they are often imprecise and turn on the specifics of a case and a balancing of many factors. Furthermore, First Amendment jurisprudence is a vast and complicated body of law that grows with each passing day. As a result, criminal conduct cannot be defined by simply referring to the title (First Amendment) or subtitle (speech or assembly) of a particular right.

Although the Supreme Court has not addressed the First Amendment issue before us, its decisions involving statutes that define criminal conduct by referring to the principles of constitutional "due process" and "equal protection" are instructive. Like the First Amendment principles of "freedom of speech" and the"free exercise of reli-**(49)** gion," due process and equal protection are complicated and nuanced constitutional concepts that are not susceptible to general definition. The existence of these rights likewise depends on the specifics of a case and a balancing of the interests involved. As I will show, the Supreme Court's opinions in Screws v. United States, 325 U.S. 91 (1945) (plurality opinion), United States v. Guest, 383 U.S. 745, 753-55 (1966), and later cases demonstrate that constitutional "due process" and "equal protection" are inherently too vague to be used to define criminal conduct without a carefully defined scienter requirement. This applies with at least as much, if not more, force to Charlottesville's mention of the First Amendment to define criminal conduct by way of exception.

In Screws the Court upheld a statute under which several law enforcement officers had been convicted of illegally depriving

a prisoner of his life without "due process" of law. See 325 U.S. at 93, 100. The defendants were prosecuted under 18 U.S.C. § 20,**12** which made it illegal to "`willfully'" deprive another"` of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States'" under the color of state law. See id. They argued to the Court that this provision was impermissibly vague as applied to their convictions for depriving the deceased of"due process" because the law provided "no ascertainable standard of guilt." See id. at 94-95. Justice Douglas, writing for a four-justice plurality, said that

> the decisions of the courts are, to be sure, a source of reference for ascertaining the specific content of the concept of due process. But even so the Act would incorporate by reference a large body of changing and uncertain law. That law is not always reducible to specific rules, is expressible only in general terms, and turns many times on the facts of a particular case. Accordingly, it is argued that such a body of legal principles lacks the basic specificity necessary for criminal statutes under our system of government. Congress did not define what it desired to punish but referred the citizen to a comprehensive law library in order to ascertain what acts were prohibited. To enforce such a statute would **(50)** be like sanctioning the practice of Caligula who"published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it."

---

12 18 U.S.C. § 20 was the predecessor to 18 U.S.C. § 242, discussed infra.**(50)**

Id. at 96 (quoting Suetonius, Lives of the Twelve Caesars 278). Indeed, seven justices indicated that § 20's use of "due process" to define criminal conduct would have been unconstitutionally vague without something else to mitigate its ambiguous incorporation of constitutional principles. See id. at 105 (§ 20 must be construed with narrow scienter requirement to "avoid grave constitutional questions"); id. at 149-50 (Roberts, J., dissenting) ("[a]ll but two" justices agreed on this issue). However, the plurality concluded that the statute could be saved by construing "willfully" to require a specific intent to purposefully deprive another of a specific federal right made definite by the express terms of the Constitution and laws of the United States or by the decisions interpreting them. See id. at 100-05. Thus, Screws "recognized that the expansive language of due process that provides a basis for judicial review is, when incorporated by reference into § 242, generally ill-suited to the far different task of giving fair warning about the scope of criminal liability," Lanier, 117 S. Ct. at 1225 (unanimous decision), but that the use of a strict scienter requirement could sufficiently mitigate this ambiguity.

The Court in Guest relied on Screws to reject a similar vagueness challenge to a prosecution for conspiracy to deprive black citizens of rights protected by the Equal Protection Clause. The Court again emphasized that the specific intent requirement of 18 U.S.C. § 241, like that of § 242, removed the problem of the statute's vagueness. See Guest, 383 U.S. at 753-54; id. at 785 (Brennan, J., concurring in part) (incorporation of constitutional provisions"brings § 241 close to the danger line of being void for vagueness" but"stringent scienter requirement saves [it] from condemnation"); see also United States v. Kozminski, 487 U.S. 931, 941 (1988) (tension between requirement of "definite standard of guilt" and "incorporat[ion] by reference a large body of potentially

evolving federal law" is resolved with strict scienter requirement).

Recently, a unanimous Supreme Court in Lanier reiterated the principles established in Screws and Guest. The Court again recognized that "in lieu of describing the specific conduct it forbids, [the] general **(51)** terms [of §§ 241 and 242] incorporate constitutional law by reference. . . . The result is that neither the statutes nor a good many of their constitutional referents delineate the range of forbidden conduct with particularity." Id. at 1224. Consequently, this "affront to the [due process] requirement" of fair notice is made permissible only when "willful violators" deprive (or conspire to deprive) others of rights that "have been `made specific' by the text or settled interpretations." See id. at 1225 (quoting Screws, 325 U.S. at 105). "[W]illful violators `certainly are in no position to say that they had no adequate advance notice'" of the definition of the crime. Id. (quoting Screws, 325 U.S. at 105).

Like the statutes in Screws, Guest, and Lanier, the Charlottesville curfew's First Amendment exception incorporates a large and growing body of law that is not reducible to specific rules and that turn on a balancing of numerous factors. Unlike the federal statutes, however, the City's curfew ordinance has no scienter requirement that could mitigate the inherent vagueness of First Amendment jurisprudence. Most important, though, the curfew regulates in areas involving constitutionally protected activity, while §§ 241 and 242 do not. In fact, those sections are designed to punish those who willfully deprive and conspire to deprive others of constitutional rights, as, for example, in United States v. Lanier, where the defendant, a state judge, sexually assaulted (in his office) several employees and others who had business before him. Lanier, 117 S. Ct. at 1222-23. Such conduct lies far outside of the realm of constitutionally protected action, and

therefore §§ 241 and 242 do not have to meet the strict vagueness standard that applies when protected activity is involved. The curfew, however, does. Consequently, the ordinance must survive scrutiny under a vagueness standard much more strict than that applied in Screws and Guest. Under that standard and in light of the absence of a scienter element capable of saving the ordinance, I would hold that the First Amendment exception and the ordinance are void for vagueness.**13** The testimony of Charlottesville's Chief of Police proves the statute's ambiguity. When asked whether two fifteen-year-olds violate the ordinance by discussing politics in a coffee shop during the curfew, the Chief said, "You're indoors, it's a public location, I . . . think technically under the ordinance it may be a violation. I doubt whether we would deal

---

13 The majority misses the mark when it says that a scienter requirement would necessarily expand, and not narrow, the breadth of Charlottesville's curfew because subsection (b)(8) "provides an exception from liability" and does not affirmatively define criminal conduct. See ante at 16 n.*. The curfew ordinance uses section (b) and its eight exceptions to define what conduct is illegal. See City Code § 17-7(b). With **(52)** respect to subsection (b)(8) in particular, the ordinance makes it a crime for minors to remain in public when not exercising First Amendment rights. See id. § 17-7(b), (b)(8). Subsection (b)(8) thus plainly incorporates the First Amendment to define the scope of criminal conduct. Even when a law is drafted to include exceptions in defining the crime, a scienter element that is applied to the criminal provision as a whole (and not just its exceptions) can reduce the objectionable vagueness of the law.

with it." Similarly, when asked if a fifteen-year-old who plays in a band in a local restaurant after curfew hours violates the curfew when he is not paid for the performance, the Chief answered, "I think that technically [the minor] is possibl[y] in violation of the ordinance." However, "the officer would obviously have to make a decision about whether they're in violation or not. And I believe there's some discretion allowed." It is this discretion combined with the failure to define with specificity what conduct is illegal that makes the statute unconstitutional. The danger of chilling the exercise of constitutionally protected activity arises because of the uncertainty associated with the First Amendment exception.**14**

The majority errs in supporting its reasoning with the fact that city councils appear to be placed "between a rock and a hard place," ante at 16. While it is true that curfews without exceptions will almost always impermissibly infringe upon substantive constitutional rights and that curfews with exceptions may be subject to vagueness challenges, invalidation of this ordinance is still mandated by our Constitution. "Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content

---

---

14 It is of no constitutional consequence that the Chief testified that "if there's a question [as to whether the First Amendment exception applied,] we would go down on the side that it was a valid Constitutional kind of activity" and "would consult with the Commonwealth Attorney or the city attorney's office to see whether it was or not." "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." Baggett, 377 U.S. at 373.**(53)**

as well as for definiteness or certainty of expression." Kolender, 461 U.S. at 357 (emphasis added); see also Nunez v. City of San Diego, 114 F.3d 935, 943-44 (9th Cir. 1997) (recognizing that interpreting curfew to avoid vagueness problems under Due Process Clause "may make it more difficult for the statute to pass constitutional muster on substantive grounds"). "[L]egislative bodies in draftsmanship obviously have the same difficulty as do the judicial in interpretation. Nevertheless despite the difficulties, courts must do their best to determine whether or not the vagueness is of such a character `that men of common intelligence must necessarily guess at its meaning.'" Winters v. New York, 333 U.S. 507, 518 (1948); see also Kingsley Int'l Pictures Corp. v. Regents of the Univ., 360 U.S. 684, 694 (1959) (Frankfurter, J., concurring). Although we may "appreciate the difficulties of drafting precise laws," we must require that all statutes meet
constitutional standards for clarity. See City of Houston v. Hill, 482 U.S. 451, 465 (1987). If we did otherwise, we would forgo our duty to enforce the mandates of the Due Process Clause. 15

Taken to its logical conclusion, the majority's reasoning would immunize all statutes regulating conduct involving the exercise of First Amendment rights whenever they contain a First Amendment "exception." Because such provisions would not be impermissibly

---

15 I also disagree with the majority's claim that the First Amendment exception "fortifies, rather than weakens, First Amendment values." See ante at 16. Because First Amendment rights can never be diminished by a city ordinance, see U.S. Const. art. VI, cl. 2, the City's exception does nothing but vague under the majority's analysis, the statutes would be

immune from both substantive and vagueness challenges. Substantively the statute cannot, according to its own terms, violate the constitution. In fact, it incorporates the Constitution's protections. The upshot is that facial attacks could never be brought and that statutes containing these exceptions could be challenged only as they are applied. This squarely conflicts with the Supreme Court's long-standing concern with the potential chill of constitutionally protected activity created by the mere existence of vague criminal statutes and the potential for their arbitrary enforcement.

For these reasons, I would hold that the curfew's First Amendment "exception" renders the ordinance impermissibly vague on its face. Until the ordinance is amended by the City Council or given a construction by state courts that sufficiently reduces its unconstitutional vagueness, its enforcement conflicts with the constitutional guarantee of due process of law.

---

15 cont'd

restate a well-settled constitutional restriction on its substantive regulatory authority. Indeed, the majority's citation to CISPES v. FBI, 770 F.2d 468 (5th Cir. 1985), contradicts its position. Cf. ante at 16. CISPES recognized that "such a provision cannot substantively operate to save an otherwise invalid statute." See 770 F.2d at 474. A statement similar to the First Amendment exception in this case, however, was used by the Fifth Circuit to determine Congressional intent and guide its construction of the provision to avoid substantial overbreadth. See id. Here, though, we are faced with a local, not a federal, statute, and therefore we are without the authority to provide a limiting construction that might save the ordinance. See Hynes, 425 U.S. at 622. The First Amendment exception thus does little to advance First Amendment values. **(54)**

IV.

In sum, I would hold that equal protection challenges by minors to laws that regulate in the area of fundamental rights must be subject to strict scrutiny. In my opinion the Charlottesville ordinance fails this standard. Even if the ordinance survived the equal protection challenge, however, it would be unconstitutional in its present form. The curfew's First Amendment exception is impermissibly vague in violation of the Due Process Clause. For these reasons, I respectfully dissent. **(55)**